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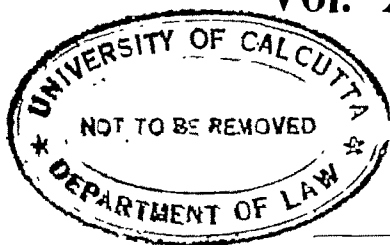
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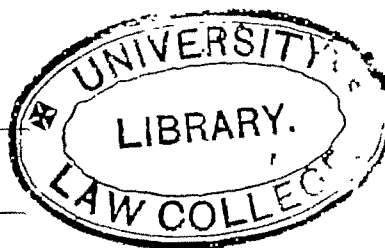
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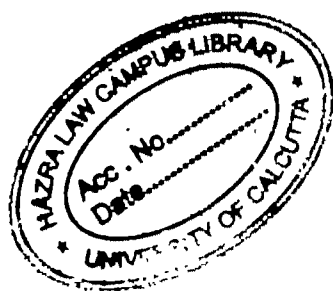


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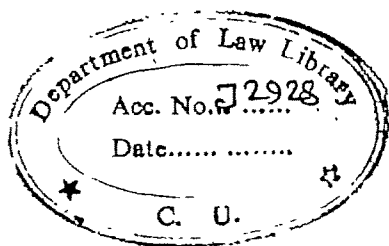
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TABLE OF CASES REPORTED.

PRIVY COUNCIL.

	PAGE.
Brijraj Singh, Kunwar <i>v.</i> Kunwar Sheodan Singh	57
Chiman Lal <i>v.</i> Hari Chand	70
Debi Bakhsh Singh, Raja <i>v.</i> Habib Shah	9
Ganesha Row <i>v.</i> Tuljaram Row	1
Janki Pershad Singh, Bhaiya <i>v.</i> Bhaiya Dwarka Pershad Singh ...	200
Joopoody Sarayya <i>v.</i> Pulavarti Lakshmanaswamy	13
Net Ram Singh <i>v.</i> Musammat Tusra Kunwar	234
Partab Singh, Kunwar <i>v.</i> Bhabuti Singh	384
Ramkishore Kedarnath <i>v.</i> Jainarayan Ramrachhpai	237
Vaithinatha Pillai <i>v.</i> The King-Emperor	365
Venkata Narasimha Appa Row, Sri, Raja, <i>v.</i> Sri Raja Parthasarathy Appa Row Savai Aswa Row	393
Venkatadri Appa Row, Sri, Raja, <i>v.</i> Sri Raja Parthasarathy Appa Row Savai Aswa Row	393
Venkatadri Appa Row, Sri, Raja, <i>v.</i> Sri Raja Venkata Narasimha Appa Row	393

APPELLATE CIVIL.

Abdul Aziz, Mir <i>v.</i> Karu	95
Abdul Goffur <i>v.</i> Sheikh Jamal	228
Abdul Jalil <i>v.</i> Amar Chand Paul	223
Abdul Rahman, Sheikh <i>v.</i> Jadunandan Singh Jha	344
Abinash Chandra Chowdhury <i>v.</i> Purnananda Khan	174
Achhutanand Bhattacharji <i>v.</i> Ram Nath Bhattacharji	354
Aftab Chowdhury <i>v.</i> Asokhadeen	131
Ahmadi Begum, Bibi <i>v.</i> Tarak Nath Ghose	399
Akhil Chandra Biswas <i>v.</i> Husain Ali Sowdagar	262
Akhil Pradhan <i>v.</i> Manmatha Nath Kar	616
Arman Sardar <i>v.</i> Satkhira Joint Stock Company, Limited	564
Askar Ali <i>v.</i> Gopi Mohan Roy Chowdhury	257
Banko Behary Das <i>v.</i> Krishna Chandra Bhowmick	170
Basanto Kumari <i>v.</i> Nanda Ram Kaibarto Dass	86
Bejoy Chand Mahatap Bahadur, Maharajahdiraj, Sir, <i>v.</i> Chandi Charan Chatterjee	347

Bepin Behary Bera v. Sosi Bhusan Datta	...	...	628
Bhagwat Buksh Roy v. Sheo Pershad Sahu	...	...	277
Bhairab Chandra Naskar v. Kadam Bewa	...	...	553
Bhajaharidas Adhikari v. Bhagabati Dasi	...	...	48
Bhowani Misser v. Peari Jha	...	...	329
Bighambhar Satbhaya v. Nadlar Chand Mandal Satbhaya	...	...	601
Budayar Rahman v. Karam Ali	...	...	271
Budhu Koer v. Hafiz Husain	...	...	274
Chandra Kumar Aich v. Chaitanya Charan De	...	...	232
Dasarath Patel v. Brojo Mohan Gaontia	...	...	621
Deb Narayan Dutt v. Chuni Lal Ghose	...	...	603
Dhiraj Bala Dasi v. Gopal Chandra Mukhopadhyaya	...	...	352
Dina Nath Das v. Ganesh Chandra Saha	...	...	544
Durbijoy Mandar v. Daman Bhagat	...	...	597
Durga Charan Mahto v. Raghunath Mahto	...	...	559
Durga Sundari Sen Gupta v. Ram Krishna Poddar	...	...	162
Faizur Rahman v. Mimansa Khatun <i>alias</i> Khala Bibi	...	...	111
Fakir Chandra Sinha Roy v. Banamali Sain	...	...	252
Ganpat Marwari v. Balmakund Behara	...	...	548
Gobind Mandar v. Banarasi Prosad	...	...	74
Godal Molla v. Aminuddi Howladar	...	...	509
Golab Chand v. Janki Koer	...	...	151
Gossain Das Kundu v. Mrittunjoy Agnan Sardar	...	...	541
Guru Das Kundu Chowdhury v. The Secretary of State for India in Council	...	...	244
Hanuman Das v. Gursahay Singh	...	...	181
Hari Mohan Misra v. The Secretary of State for India in Council	...	...	566
Hemanta Kumari Debi, Rani v. Maharaja Jagadindra Nath Roy Bahadur	...	...	526
Himat Khan v. Sher Khan	...	...	260
Ichhamayi v. Kallas Chandra Mukerjee	...	...	536
Indramani Dasya v. Priya Nath Chakravarti	...	...	505
Jamahar, Sheikh v. Sheikh Nazir	...	...	512
Janki Koer v. Golab Chand	...	...	151
Kalanand Singh, Kumar v. Eastern Mortgage Agency Co., Ltd.	...	...	83
Kenaram Bakshi v. Kallas Chandra Dutt	...	...	53
Keshab Panda, <i>alias</i> , Siva Panda v. Bhubani Panda	...	...	187
Keshwar Bhagat v. Sheo Prosad Lal	...	...	166
Khirodamoyee Dasi v. Prodyot Kumar Addya	...	...	122
Khirodamoyi Dasi v. Adhar Chandra Ghose	...	...	321
Krishna Chandra Ghosh v. Maharaja Ram Narain Singh Bahadur	...	...	124
Lachmi Prosad Chowdhury v. Jag Mohan Lal Chaubey	...	...	633
Lakhi Narain Jagdeb v. Chowdhury Kirtibas Das	...	...	143

	PAGE.
Mahamaya Kar, Srimati v. Kishore Chang ...	502
Manindra Chandra Nandi, Maharaja v. Jagannath Khan ...	324
Manohor Mukherjee v. Paresb Chandra Mukherjee ...	175
Mati Sheikh v. Balkantha Nath Kar ...	269
Mrltyunjoy Bhattacharjee v. Bbola Nath Dutt ...	81
Nabin Chandra Tripathi v. Kali Kumar Das ...	613
Nilmadhub Mahta v. Raj Kishore Das ...	220
Nistarini Debi v. Rai Mohun Biswas ...	214
Parbati v. Tulsi Koeri ...	128
Pran Krishna Saha v. Mukta Sundari Dassya ...	193
Proshad Narain Singh, Sri v. Mussammat Dulhin Genda Koer ...	612
Purno Chandra Kunwar v. Maharajadhiraj Bejoy Chand Mahatab Bahadur ...	18
Radha Madhab Narain Hikim v. Milan Mahato ...	23
Ramdhani Sha v. Topi Bibi ...	264
Ram Nath Singh v. Basanta Narain Singh ...	209
Ram Prasad Singh, Chowdhury v. Chowdhury Pawan Singh ...	27
Ram Soshi Ray v. C. E. Grey ...	123
Ramtaran Nag Mazumdar v. Hari Charan Nag Mazumdar ..	556
Rudra Narain Maiti v. Natobar Jana ...	89
Sailaja Prosad Chatterjee v. Gyani Das ...	29
Sajed, Sheikh v. Sarada Prosad Chowdhuri ...	45
Salimullah Bahadur, Nawab, Sir v. Sainaddi Sarkar ...	538
Sarbananda Nath Bhowmick v. Rana Gasi ...	334
Saroda Kumar Roy v. Jagabandhu Saha ...	332
Secretary of State for India in Council v. Rashidul Huq ...	31
Shib Sharan Sha v. Janaki Nath Dey ...	78
Siba Prosad Samanta v. Gossain Das Dutt ...	337
Suprasanna Roy v. Upendra Narain Roy... ..	638
Surja Narain Jha v. Bunwari Jha ...	35
Tribeni Prosad Singh v. Sheikh Basirul Meah ...	327
Tulsi Mahton v. Chethru Lal ..	43
W. M. Grant v. Harsahai Singh ...	76

CIVIL REFERENCE.

In the goods of Harriett Teviot Kerr, deceased ...	308
--	-----

CIVIL RULE.

Anandamoyi Dasi v. Rudra Mahanti ...	141
Ashi Bhusan Dasi v. Pelaram Mandal ...	304
Bajjnath Prasad Singh v. Sham Sunder Kuer ...	643
East Indian Railway Company v. Babu Madho Lal ..	147
Hanseswar Ghose v. Rakhal Das Ghose ...	359

	PAGE.
Harai Saha v. Faizlar Rahman	144
Hari Lal v. Parjag Ram	39
Parbati v. Tulsi Koeri	125
Peary Lal Das v. Peary Lal Dawn	646
Radha Gobind Misra v. Raghunath Misra	138
Radhasyam Kar v. Dinobandhoo Biswas	533
Ram Nath Maity v. Rudra Mahanti	142

ORIGINAL CIVIL.

Shamul Kissore Addy v. Rai Saheb Girindra Nath Mukhopadhy...	594
--	-----

APPELLATE CRIMINAL.

Akram Ali v. Emperor	574
Ataur Singh v. King-Emperor	121
Baharuddin Mandal v. Emperor	578
C. H. Booth v. Emperor...	567
Chintamon Singh v. King-Emperor	119
Emperor v. Gaya Prosad	519
Khusir Bap v. Emperor	590
Nafar Sheikh v. Emperor	582
Shaheber Ma v. Emperor	590

CRIMINAL REFERENCE.

Emperor v. Tarapada Naskar	522
----------------------------	-----

CRIMINAL REVISION.

Gobinda Chandra Ray v. Gopal Chandra Pandit	150
In the matter of the Amita Bazar Patrika	452
Kali Charan Mukerjee v. Emperor	514

TABLE OF CASES CITED.

VOLUME XVIII.

A

	PAGE.
Abdul Hai, Mahomed v. Gujraj Sahai (1893) I. L. R. 25 Calc. 826; L. R. 20 I. A. 70	630
Abdul Hakim v. Latifunnessa Khatun (1903) I. L. R. 30 Calc. 532	47
Abhiram Dass v. Gopal Dass (1889) I. L. R. 17 Calc. 48	613
Abhoy Charan v. Dwarka Nath (1911) I. L. R. 39 Calc. 53	444
Abid, Muhammad v. Muhammad Asghar (1885) I. L. R. 8 All. 64	36
Abu Fazl, Syed Habibar Rasul v. Ashita Mohan Ghosh (1908) 12 C. W. N. 610	557
Achal Rathi, Lala v. Kazim Hossein (1905) L. R. 32 I. A. 113; I. L. R. 27 All. 271	443
Agra Bank v. Hamlin (1890) I. L. R. 14 Mad. 235	56
Akhoy Kumar, Soor v. Bejoy Chand Mohatap (1903) I. L. R. 20 Calc. 813	535
Aktowll v. Tarak Nath Ghose (1912) 16 C. L. J. 328	637
Alabama v. Georgia (1859) 23 Howard 505	399
Alexander John Forbes v. Meer Mahomed Toquee (1870) 13 M. I. A. 438	395
Allen v. Quebec Warehouse Company (1836) L. R. 12 A. C. 101 (104)	393
Ambika Dat v. Sukhmani Kuar. (1877) I. L. R. 1 All. 437	413
Ameer Chand v. Mahanund Bibi (1907) 6 C. L. J. 453	643
Ameer Hossein, Syud v. Sheo Suhae (1878) 19 W. R. 338	27
American Exchange v. Gillig (1889) 53 L. J. Ch. 706	496
Amiruddin Munshi v. Ulfatunnissa Bibi (1908) 13 C. W. N. 108	93
Amirullah v. Nazir Mahomed (1904) I. L. R. 31 Calc. 932 (1905) I. L. R. 34 Calc. 104	197
Amirunnessa Khatoon v. E. Browne (1883) 13 C. L. R. 131	106
Amirunnessa Khatoon v. The Secretary of State for India in Council (1883) I. L. R. 10 Calc. 63	106
Anandamoyee v. Lakhi Chandra (1906) I. L. R. 33 Calc. 339	553
Anandrao Ganpatrao v. Vasantrao Madhavrao (1907) 5 C. L. J. 338; 11 C. W. N. 478	552
Androscoggin v. Androscoggin (1862) 49 Me. 392	494
Annada Prosad v. Mathura Nath (1909) 9 C. L. J. 585; 13 C. W. N. 702	510
Ansar Ali Jemadar v. C. E. Gray (1905) 2 C. L. J. 403	351
Anundloh v. James Mills (1865) 4 W. R. Act X 33	76
Anund Moye v. Grish Chunder (1831) I. L. R. 7 Calc. 772	606
Aparna v. Karam All (1906) 4 C. L. J. 537; (Sub-nominee Apurna v. Kasam All 10 C. W. N. 527)	83
Appa Rao v. Suryaprokasa Rao (1899) I. L. R. 23 Mad 94	329
Arkwright v. Gell (1839) 5 M. and W. 203	132
Asanoollah, Khaja v. Kalee Mohun (1872) 18 W. R. 469	273
Ashraf Ali v. Emperor (1909) I. L. R. 36 Calc. 1016	515
Atchinson-Hallway Co., v. Jennison (1886) 60 Mich 232; 27 N. W. 6	491
Azim, Sheikh v. Chandra Nath (1904) 8 C. W. N. 748	612, 644

B

	PAGE.
Babu v. Jaitlal (1893) 7 C. P. L. R. 137	625
Badan Chandra Das v. Rajeswari Debya (1905) 2 C. L. J. 570	197, 239
Badri Das v. Inayat (1900) I. L. R. 22 All 404	133
Bafatum v. Bilait Khanum (1903) I. L. R. 30 Calc. 683	214
Bal Devkore v. Amritram (1885) I. L. R. 10 Bom. 37	308
Balkunta Nath Dey v. Nawab Salimulla Bahadur (1907) 6 C. L. J. 547	209
Bajrangi Singh v. Manokarnika Baksh Singh (1907) L. R. 35 I. A. 1; I. L. R. 30 All. 1	163
Balgobind Das v. Narain Lal (1893) L. R. 20 I. A. 116; I. L. R. 15 All 339	344
Balkishen v. Simpson (1898) I. L. R. 25 Calc. 833	505
Balkishen Das v. Ram Narain Sahu (1903) L. R. 30 I. A. 139; I. L. R. 30 Calc. 738	60, 237
Balkishen Das v. W. T. Legge (1899) I. L. R. 22 All 149	230
Bandan v. Becher (1835) 3 Cl. & F. 479	616
Baraik Kamal v. Lilhu Christian (1908) 8 C. L. J. 170	515
Basanto v. Nanda (1913) 18 C. L. J. 8	95
Batai Ahir v. Bhuggobutty Koer (1882) 11 C. L. R. 476	167
Bechu Singh v. Bicharam Sahu (1909) 10 C. L. J. 91	134
Beer Pertab Sahoo v. Maharajah Rajender Pertab Sahoo (1867) 12 M. I. A. 1	395
Behari Lal Paul v. Gopal Lal Seal (1897) 1 C. W. N. 695	144
Behary Lal Pundit v. Kedar Nath Mullick (1891) I. L. R. 18 Calc. 469	267
Beni Pershad Kosri v. Dudhnath Roy (1899) L. R. 26 I. A. 220; I. L. R. 27 Calc. 56; 4 C. W. N. 274	26
Bhau Nanaji Utpat v. Sundra Bai (1874) 11 B. H. C. R. 249	203
Bhoobun Chunder v. Ram Soonder (1877) I. L. R. 3 Calc. 300	106
Bhupati Nath Smrititiratha v. Ram Lal Maitra (1909) I. L. R. 37 Calc. 128; 10 C. L. J. 355	351
Bhut Nath v. Surendra Nath (1909) 11 C. L. J. 98; 13 C. W. N. 1025	536
Bibi Sharifan v. Mahamed Habilbuddin (1911) 13 C. L. J. 535	144
Biraj Mohini v. Chinta Moni (1901) 5 C. W. N. 877	128
Birendra Kishore Manikya Bahadur, Rajah v. Akram Ali (1912) 15 C. L. J. 194; 16 C. W. N. 304	602
Bisheswar v. Jasoda Lal (1913) 17 C. W. N. 622	274
Bissesur Chuckerbutty v. Wooma Churn Roy (1867) 7 W. R. 44	78
Bissesuri Dabee v. Baroda Kanta (1881) I. L. R. 10 Calc. 1076	414
Boldya Nath Adya v. Makhan Lal Adya (1890) I. L. R. 17 Calc. 680	42
Borden v. Keverberge (1836) 2 M & W 61	304
Brij Mohun v. Rai Uma Nath (1892) I. L. R. 20 Calc. 8	533
Briatowe v. Taylor (1816) 2 Starkie 50	626
Bulst v. Bridge (1880) 43 L. T. 432	484
Buldeo Misser v. Syed Ahmed (1871) 15 W. R. 143	130
Bungshidhar v. Kedar Nath (1899) 1 C. W. N. 114	144
Byjnath Majumdar v. Deen Dyal Gooput (1814) 2 Sel. Rep. 133	159

C

Callan v. Mc Daniel (1882) 72 Alabama 96	491
Callow v. Young (1877) 56 L. J. Ch 630	484
Carter v. Pryke (1792) Peake 95	303

	PAGE.
Cartwright's Case (1873) 114 Mas. 238 ...	490
Casperas v. Kader Nath (1901) I. L. R. 28 Calc. 738, 5 C. W. N. 858 (861) ...	193, 196
Chaitan Singh v. Sadhari Monim (1905) 5 C. L. J. 62 ...	23
Chakouri Mahton v. Ganga Pershad (1911) 15 C. L. J. 228 ...	45
Chalho Singh v. Jharo Singh (1911) I. L. R. 39 Calc. 995 ...	634
Chamatkari v. Triguna (1913) 17 C. W. N. 833 ...	272
Chandanbala Debi v. Probodh Chandra (1909) 9 C. L. J. 251; I. L. R. 36 Calc. 422 ...	265
Chandika Bakhsh v. Muna Kunwar (1901-2) I. L. R. 24 All. 273; L. R. 29 I. A. 7 ...	562
Chandra Mohun v. Bissesswar (1892) 1 C. W. N. 158 ...	257
Chhatrapat Singh v. Gopi Chand Bothra (1899) I. L. R. 26 Calc. 750 ...	92
Chintamon Singh v. Emperor (1907) I. L. R. 35 Calc. 243; 7 C. L. J. 177; 12 C. W. N. 299 ...	120
Chintamon Singh v. King-Emperor (1903) 18 C. L. J. 119 ...	121
Chooni v. Jussoo (1809) 1 Bor. 55 ...	633
Chundoe v. Shib (1880) I. L. R. 5 Calc. 945; 6 C. L. R. 269 ...	399
Chunder Nath v. Tirthanund Thakoor (1872) I. L. R. 3 Calc. 504 ...	114
Chundi Charan v. Banke (1899) I. L. R. 26 Calc. 449 ...	173
Chundra Sakai v. Kali Prosanno Chuckerbutty (1895) I. L. R. 23 Calc. 254 ...	259
Chutturdharee v. Telukdharee (1839) 6 Mac. Sel. Rep 325; 7 Ind. Dec. O. S. 910 ...	562
Clark v. Elphinstone (1880) 6 App. Cas. 164 ...	275
Collector of Maldah, The v. Nirodo Kamini Dassy (1912) 17 C. W. N. 21 ...	308
Collector of Masulipatam v. Cavalry Vencata Narrainapah (1861) 8 M. I. A. 529 ...	635
Collector of Trichinpoli v. Lekkamani (1874) L. R. 11 I. A. 286, 14 B. L. R. 115 ...	393
Cooverji v. Dewsey (1893) I. L. R. 17 Bom. 718 ...	139

D

Damodar v. Vyanku (1906) I. L. R. 31 Bom. 244 ...	133
Daryao Singh v. Mukund Singh (1898) 2 C. P. L. R. 103 ...	625
Daw v. Eley (1868) L. R. 7 Eqr. 49 ...	498
Debi Bakhsh Singh v. Chandrabhan Singh (1910) L. R. 37 I. A. 158, I. L. R. 32 All. 599 ...	202
Debnarayan Dutt v. Baldya Nath (1909) 14 C. W. N. 68 ...	92
Deendayal Lal v. Jugdeep Narain Singh (1877) L. R. 4 I. A. 247, I. L. R. 3 Calc. 198 ...	240
Deonandan Singh v. Manbodh Singh (1904) I. L. R. 32 Calc. 111 ...	107
Deosaran v. Syedunnessa (1912) 16 C. L. J. 571 ...	122
Dhino Nath Mitter v. Bejoy Krishna Das (A. O. D. 194 of 1900 decided by Banerjee and Stevens J. J. on the 18th June. 1900) unreported ...	136
Dhonkal Singh v. Phakar Singh (1893) I. L. R. 15 All. 84 (F. B.) ...	46
Dhunput Singh v. Mahomed Kazim (1896) I. L. R. 24 Calc. 296 ...	510
Dinendra Narayan Roy v. Tituram Mukerji (1903) I. L. R. 30 Calc. 801 ...	196

	PAGE.
Doe v. Sisson (1810) 12 East. 62	304
Dood Caraigan v. Bywater (1849) 7 C. B. 794	490
Doolee Chund v. Oomda Begum (1875) 24 W. R. 263	30
Doolhub Sircar v. Kristo Coomar (1869) 12 W. R. 303	30
Doorga Singh v. Sheo Pershad Singh (1889) I. L. R. 16 Calc. 194	98, 111
Dosibai v. Ishwardas (1885) I. L. R. 9 Bom. 561	297
Dosibai v. Iswardas (1891) L. R. 18 I. A. 22; I. L. R. 15 Bom. 222	304
Draper v. Wood (1873) 112 Mass 315	354
Durga Charan v. Kali Prasanna (1899) I. L. R. 26 Calc. 727	564
Durga Nath Paramanik v. Chintamani Dassi (1903) I. L. R. 31 Calc. 241	165
Durga Prosad v. Daula Gazee (1894) 1 C. W. N. 160	257
Durga Prosunno Ghose v. Kalidas Dut (1881) 9 C. L. R. 449	27
Dwarka Nath Roy v. Ram Chand Alch (1899) I. L. R. 26 Calc. 428	546
Dwarka Prosad v. Raghuber (1910) 13 Bom. L. R. 133	550

E

Ecclesiastical Commissioners of England and Wales v. Rowe (1880) L. R. 5 A. C. 736	415
Emperor v. Annada Charan Thakur (1909) I. L. R. 36 Calc. 629; 9 C. L. J. 638	523
Emperor v. Challan (1905) I. L. R. 29 Mad. 91	522
Empress v. Shava (1891) I. L. R. 16 Bom. 359	586
Empress v. Viraperumal (1892) I. L. R. 16 Mad. 105	586
E. R. v. Clement (1821) 4 B. & Ald. 218	490
Essex v. The Acton Local Board. (1889) 14 App. Cas. 163	244
Exparte Bradley (1861) 7 Wallaco 364	491
Exparte Cochrame (1875) L. R. 20 Eq. Cas. 282	361
Exparte Edith May Hallowel Carew (1897) L. R. A. C. 719	369
Exparte Fernandez (1861) 10 C. B. N. S. 3.	494
Exparte Mac Crae (1893) L. R. 20 I. A. 90; I. L. R. 15 All 310	368
Exparte Robinson (1873) 19 Wallace 505	490
Exparte Sidebotham (1879) 14 Ch. D. 458	359
Exparte Terry (1888) 128 U. S. 289	494
Exparte Tillinghast (1830) 4 Peter 103	491

F

Fakir v. Emperor (1905) 11 C. W. N. 51	583
Falkland Islands Company, The v. The Queen (1863) 1. M. P. C. C. 299	368
Fatesingji, Thakore v. Bomanji Dalal (1903) I. L. R. 27 Bom. 515	291
Fink v. Maharaj Bahadur Singh (1899) I. L. R. 26 Calc. 772	145
Forbes v. Meer Mahomed (1870) 13 M. I. A. 438; 5 B. L. R. 529; 14 W. R. P. C. 28	306
Forbes v. Meer Mahomed Hossain (1873) 13 B. L. R. 210; 30 W. R. 44; 2 Suther. P. C. 865	399
Foley Chunder v. Foley (1887) I. L. R. 15 Calc. 492	30

G

Gagan v. Alak Chahd (1913) 17 C. W. N. 698	257
Gagan Sheikh v. Abejan Khatun (1911) 14 C. L. J. 180	273

	PAGE.
Gajendra Singh v. Sardar Singh (1895) I. L. R. 18 All 176 (179 and 180) ...	235
Gandy v. Gandy (1885) 30 Ch. D. 57 ...	611
Ganendra Nath v. Surya Kant (1912) 17 C. W. N. 462 ...	357
Gannu Singh v. Bhagwati (1909) 3 I. C. 234 (R. A. 296 of 1906) ...	549
Ganput v. Jasodhur (1895) 17 C. L. J. 520 ...	7495
Garurudhwaja's case (1900) L. R. 27 I. A. 288, I. L. R. 23 All 37 ...	291, 417
Gaved v. Martyn, (1865) 19 C. B. N. S. 732 (758) ...	132
Ghulam Khan v. Muhammad Hassan (1901) I. L. R. 29 Calc. 167, ...	37
Giribala v. Mina Kumari (1900) 5 C. W. N. 497 ...	30
Girija Nath Roy Bahadur v. Palani Bibee (1883) I. L. R. 17 Calc. 263 ...	535
Girish Chandra Das v. Kunja Behari (1908) I. L. R. 35 Calc. 683 ...	606
Gobinda Mohan v. Kunja Behari (1909) 10 C. L. J. 414 ...	482
Gobinda Nath v. Surja Kanto (1899) I. L. R. 26 Calc. 450 ...	423
Gobind Mandar v. Banarasi Prosad (1913) 18 C. L. J. 74 ...	95
Golab Chand v. Janki Koer (1908) I. L. R. 36 Calc. 267 ...	152
Golam Panja v. Hurish Chunder (1872) 17 W. R. 552 ...	23
Gonesh Persad v. Pande Brij Behary (1902) 1 C. L. J. 565 ...	104
Goobl Sheikh v. Mathewson (1907) 11 C. W. N. 661 ...	555
Gooroo Pershad Bose v. Bisnoochurn Heyra (1811) 1 Sel. Rep. 452 ...	158
Gopal v. Govind (1900) 13 C. P. L. R. 113 ...	625
Gopal v. Hanmant (1879) I. L. R. 3 Bom. 273 ...	559
Gopal v. Nobbo Kishen (1866) 5 W. R. Act X 83 ...	76
Gopal Mandal v. Eshan Chunder Banerjee (1901) I. L. R. 29 Calc. 148 ...	197
Gopeenath Rai v. Ramchander Turkalunkar (1803) Seves 467 ...	442
Gossain Dulmir v. Tekait Hetnarain (1880) 6 C. L. R. 467 ...	42
Gour v. Mukundo (1905) 9 C. W. N. 710 ...	48
Gour Chandra v. Prasanna Kumar (1906) 3 C. L. J. 363; I. L. R. 33 Calc. 812 ...	354
Government of Bengal, The v. Nawab Jafur Hossein Khan (1854) 5 M. L. A. 457 ...	152
Govinda Nair v. Kesava (1880) I. L. R. 3 Mad. 81 ...	138
Grant v. Mrs. Robinson (1905) 11 C. W. N. 242 ...	196
Gregory and Parker v. Williams (1817) 3 Mer. 582 ...	604
Grey v. Anand Mohan (1864) W. R. 108 ...	422
Groves v. Administrator General (1893) I. L. R. 22 Mad. 49 ...	628
Gulabdas Jugjivandas v. Collector of Surat (1878) I. L. R. 3 Bom. 186 ...	33
Gulab Koer v. Badshah Bahadur (1903) 10 C. L. J. 420 ...	128
Gulab Misser v. Kalanand Singh (1910) 14 C. W. N. 884; 12 C. L. J. 107 ...	196
Gunesb Dutt Singh v. Maharaja Moheshur Singh (1855) 6 M. L. A. 164 ...	393
Gurdeo Singh v. Chandrikah Singh (1907) 5 C. L. J. 611; I. L. R. 36 Calc. 193 ...	46
H	
Hanbury v. Jenkins (1901) 2 Ch. 401 ...	451
Hanna v. Pollock (1900) 2 I. R. 654 ...	132
Hanuman Das v. Gursahay Singh (1909) 18 C. L. J. 181 ...	735
Har Narain, Raja v. Chaudhrain Bhagwant (1891) I. L. R. 12 All. 300 ...	36

	PAGE.
Harpershad v. Sheo Dyal (1876) L. R. 3 I. A. 259	561
Hari Sundari Dassya v. Sashi Bala Dassya (1896) 1 C. W. N. 195	145
Harryhur Mukhopadhyaya v. Madub Baboo (1871) 14 M. I. A. 152	167
Hassan Kuli Khan v. Nakchhed (1905) I. L. R. 33 Calc. 200	94
Hem Chandra Chowdhury v. Jagadindra Nath Roy (1905) 9 C. W. N. 934	404
Hem Chunder Bhunjo v. Monmohini Dassi (1894) 3 C. W. N. 604	92
Hemanta Kumari Debi v. Jagadindra Nath Roy Bahadur (1894) I. L. R. 22 Calc. 214	176
Hjatunnessa v. Kailas Chandra (1905) (since reported) in 16 C. L. J. 259	185, 357
Hindson v. Ashby (1896) 1 Ch. 78; (1889) 2 Ch. 1	399, 418
Hiralal Mukerji v. Premamoyee Debi (1905) 2 C. L. J. 306	46
Hiramoti Dassya v. Annoda Prosad (1908) 7 C. L. J. 533	292
Hollingham v. Head (1858) 4 C. B. N. S. 388; 114 R. R. 780	303
Hoolash Kooer v. Kasee Proshad (1881) I. L. R. 7 Calc. 369 (371)	235
Hari Das Mal v. Mahomed Jaki (1885) I. L. R. 11 Calc. 414	419
Howard v. Ingersoll (1851) 13 Howard 381	399
Hunt v. Clarke (1839) 58 L. J. R. B. 490	498
Hurday Narain Sahu, Baboo v. Pundit Baboo Rooder Perkash Misser. (1883) L. R. 11 I. A. 26; I. L. R. 10 Calc. 626	240
Huro Nath v. Ameer Biswas (1864) 1 W. R. 230	76
Hurrogobind Raha v. Ramrutno Dey (1878) I. L. R. 4 Calc. 67	351
Husaini Begam v. Khwaja Muhammad Khan (1906) I. L. R. 29 All. 151	605
Hyder Hossain v. Mahomed Hossain (1872) 14 M. I. A. 401	203

I

Ibrahim Ali Khan, Nawab v. Nawab Muhammad Ashan Ulla Khan (1912) L. R. 39 I. A. 85; I. L. R. 39 Calc. 711	202
Imam Ali Khan, Muhammad v. Sardar Husain Khan (1893) L. R. 25 I. A. 161; I. L. R. 26 Calc. 81	61
Indur Subbarami Reddy v. Kandadin Rajamannar Ayyangar (1902) I. L. R. 26 Mad. 47	36
In re Abdool (1867) 8 W. R. Cr. 32	453
In re Abraham Mallory Dillet (1887) L. R. 12 A. C. 459	365
In re Charlton (1837) 2 My. and Cr. 316	496
In re Clements (1877) 46 L. J. Ch. 375	501
In re Crown Bank (1890) 44 Ch. D. 649	498
In re Davies (1888) 21 Q. B. D. 286	495
In re Emery (1907) 149 Michigan 383; 112 N. W. 951	494
In re Packer (1911) Vict. R. R. 401	494
In re Ballard (1868) L. R. 3 P. C. 106	453
In re Rasu Haji Cassum (1910) 13 Bom. L. R. 13	361
In re St. James's Evening Post (1742) 2 Atk. 469	456
In re Venkat Rao (1911) 21 M. L. J. 832	453
In re Wallace (1866) L. R. 1 P. C. 283	496
In re Williamson (1855) 26 Pa. St. 9; 67 Am. Dec. 374	491
In the case of the King's Prerogative in Sultpentre (1607) 12 Co. 12	152, 159
In the goods of Charles Edward Maclean (1874) 6 All. H. C. R. 214	319
In the goods of F. J. Avdall (1892) I. L. R. 26 Calc. 404	309

	PAGE.
<i>In the goods of Peter Innes</i> (1871) 16 W. R. 253; 8 B. L. R. App. 43 ...	319
<i>In the goods of Ram Chunder Dose</i> (1872) 18 W. R. 153; 9 B. L. R. 30 ...	319
<i>In the goods of Ram Chunder Lakshmanji</i> (1876) I. L. R. 1 Bom. 118 ...	320
<i>In the matter of an application for an attachment for contempt of Court</i> (1886) 2 T. L. R. 351 ...	494
<i>In the matter of Land Acquisition Act X of 1870, Munji Khetsey</i> (1890) I. L. R. 15 Bom. 279 ...	251
<i>Ishan Chandra v. Raja Ramranjan</i> (1905) 2 C. L. J. 125 ...	291, 634
<i>Ishan Chandra v. Upendra Nath</i> (1908) 12 C. W. N. 559 ...	404
<i>Ishingumusi v. The Attorney General of the Colony of Natal</i> (1908) L. R. A. C. 248 ...	369
<i>Isari, Muhammad Hadi</i> (1902) I. L. R. 24 All. 368 ...	354
<i>Isari Singh, Thakur v. Baldeo Singh</i> (1884) L. R. 11 I. A. 135; I. L. R. 10 Calc. 792 ...	203
<i>Isari Dut Koer v. Mussumut Hansbutti Koerain</i> (1883) L. R. 10 I. A. 150; I. L. R. 10 Calc. 324 ...	386

J

<i>Jagannadha v. Pedda Pakir</i> (1881) I. L. R. 4 Mad. 371 ...	34
<i>Jagannath v. Mannu Lal</i> (1894) I. L. R. 16 All. 231 ...	239
<i>Jagdish Bahadur v. Sheo Partab Singh</i> (1901) L. R. 28 I. A. 100, I. L. R. 23 All. 369 ...	202
<i>Jagwant Singh v. Silan Singh</i> (1899) I. L. R. 21 All. 287 ...	61
<i>Janardhan v. Kali Kristo</i> (1885) I. L. R. 23 Calc. 393 ...	144
<i>Janki Singh v. Debi Nandan Prashad</i> (1910) 15 C. W. N. 776 ...	115
<i>Jarip Khan v. Darfa Bowa</i> (1912) 17 C. W. N. 59; 16 C. L. J. 144 ...	253
<i>Jatinga Valley Tea Company v. Chera Tea Company</i> (1885) I. L. R. 12 Calc. 45 ...	213
<i>Jawadul Huq v. Ram Das Sahu</i> (1896) I. L. R. 24 Calc. 143 ...	269
<i>Joet Nath v. Loke Nath</i> (1873) 19 W. R. 239 ...	562
<i>Jodu Nath Poddar v. Rup Lal</i> (1906) I. L. R. 33 Calc. 967; 4 C. L. J. 22 ...	619
<i>Jogendra Narayan Roy v. Crawford</i> (1905) I. L. R. 32 Calc. 1141 ...	404
<i>Joges Chandra Dutt v. Kali Charan Dutt</i> (1877) I. L. R. 13 Calc. 30 ...	209, 213, 226
<i>Joges Chandra Roy v. Raj Kumar Roy</i> —Mis. 94 of 1900 decided by Ameer Ali and Brett J. J. on the 30th July, 1900 unreported ...	135
<i>Johnson v. Rex</i> (1904) L. R. A. C. 817 ...	366
<i>Jones v. Chapman</i> (1847) 2 Ex. 803; 76 R. R. 794 ...	412
<i>Jotindra v. Chandra Nath</i> (1902) 6 C. W. N. 360 ...	83
<i>Joy Chandra v. Srinath</i> (1904) 1 C. L. J. 23; I. L. R. 32 Calc. 357 ...	362
<i>Joy Dutt Jha v. Baxee Ram Singh</i> (1867) 7 W. R. 40 ...	51
<i>Jugjeevun v. Deoshunker</i> (1812) 1 Bor. 391 ...	633
<i>Jugo Bundhoo Tewaroe v. Kurum Singh</i> (1874) 22 W. R. 341 ...	6

K

<i>K. B. Dutt v. Gostha Behary Bhuiya</i> (1912) 16 C. W. N. 1006 ...	81
<i>Kabil Sardar v. Chunder Nath</i> (1892) I. L. R. 20 Calc. 590 ...	257

Kachi Kalinga v. Kachi Yava (1905) L. R. 32 I. A. 261	I. L. R. 28 Mad	508	393
Kali Kumari v. Bachan Singh (1913) 17 C. W. N. 974	...	...	638
Kali Kumar v. Bidhu Bhusan (1911) 16 C. L. J. 89	...	...	272
Kanta Proshad v. Abdul Jamir (1904) 8 C. W. N. 676	...	...	450
Karuppanan Servai v. Srinivasan Chetti (1901) L. R. 39 I. A. 38	I. L. R.	...	...
25 Mad. 215	...	...	71, 396
Kashi Nath v. Emperor (1905) I. L. R. 32 Calc. 557	...	...	515
Kena Mohamed v. Bobatoo Sarcar (1863) Marshall	506	...	131
Kennedy v. De Trafford (1897) App. Cas. 180	...	...	117
Kesa Sahay Singh, Chowdhury v. Giani Roy (1902) 6 C. W. N. 776	I. L. R.	...	...
29 Calc. 626	...	...	172
Khachera v. Kharag Singh (1910) 7 A. L. J. R. 842	I. L. R. 33 All. 20	...	379
Khatiza Bibi v. Ganga Charan Das.—Reg. file No. 3 of 1905 decided by	Maclean C. J. and Mitra J. on 26th April, 1905	...	135
Khetoo Mohan v. Mohim Chandra (1913) 17 C. W. N. 518	...	...	82
Khettramoni Dasi v. Shyama Churn Kundu (1894) I. L. R. 21 Calc. 539	...	...	612
Khiarajmal v. Daim (1904) I. L. R. 32 Calc. 296	...	...	20
Khoorshed Hossein v. Teknarain Singh (1878) 2 C. L. R. 141	...	...	132
King v. Brasler (1779) 1 Leach 199	...	...	582
Kishendatt Ram, Raja v. Raja Mamta Ali Khan (1879) I. L. R. 5 Calc. 198	...	...	336
Kishen Parshad v. Har Narain (1911) L. R. 38 I. A. 45	9 C. L. J. 158	13	...
C. W. N. 321	...	...	550
Kishore Adhikari v. Chandra Nath Dutt (1907) 12 C. W. N. 878	...	...	259
Kishwar Nath v. Kall Sankar (1905) 10 C. W. N. 343	...	...	415
Klitcat v. Sharp (1882) 52 L. J. Ch. 134	...	...	498
Kochappa v. Sachl Devi (1902) I. L. R. 26 Mad. 494	...	...	463
Koer Hasmal Rai v. Sunder Das (1885) I. L. R. 11 Calc. 396	...	...	239
Kooldeep v. Government (1871) 14 M. I. A. 24	...	...	305, 395
Koolodeep Narain v. Mahadeo Singh (1860) 6 W. R. 199	B. L. R. Sup.	...	...
Vol. 559	...	...	278
Kripall Singh v. Pairoo Raut (1909) 11 C. L. J. 86	...	...	144
Krishna Kant v. Krishna Chandra (1904) 9 C. W. N. 303	...	...	326
Krishno v. Mee Sufdur (1874) 22 W. R. 326	...	...	272
Krishnayya v. Unnissa Begum (1891) I. L. R. 15 Mad. 399	...	...	628
Kupoor v. Sevukram (1815) 1 Bor. 405	...	...	633
Kuriya Mal v. Bishambhar Das (1910) I. L. R. 32 All. 225	...	...	212
Kylash Chunder v. Woomanund Roy (1875) 24 W. R. 412	...	...	326

L

Lachman v. Jamna (1887) I. L. R. 10 All. 162	...	...	357
Lakhamgawla Basaprabhu v. Keshav Annaji (1901) I. L. R. 28 Bom	305	...	285
Lakhi Narain v. Multan Chand (1912) 17 C. L. J. 230	...	...	612
Lal Behary v. Habibur (1898) I. L. R. 26 Calc. 166	...	...	133
Lal Mahomed Sarkar v. Jagir Sheikh (1909) 13 C. W. N. 931	...	...	197
Lal Singh v. Ghansham Singh (1887) I. L. R. 9 All. 625	...	...	386
Lalit Mohan Das v. Radharaman (1911) 15 C. W. N. 1021	...	...	613

	PAGE.
Lalunmonoe, Rancee v. Rajah Ajoodhya Ram Khan (1874) 23 W. R. 61	326
Levy v. Moylon (1850) 10 C. B. 189; 84 R. R. 521	490
Lilanand v. Manoranjan (1873) L. R. 1. A. Sup. Vol. 181; 13 B. L. R. 124	306
Littler v. Thomson (1839) 2 Beav. 129	498
Lokenath v. Jahanis (1911) 14 C. L. J. 572	399
Lopez v. Muddun Mohun (1870) 13 M. I. A. 467, 5 B. L. R. 521, 14 W. R. P. C. 11	450
Lord Advocate v. Lord Blantyre (1879) L. R. 4 A. C. 770	407
Lows v. Tilford (1876) L. R. 1 A. C. 414	412
Lukhee Dasi v. Khatima Debi (1813) 2 Sel. Rep. 64	423
Lukhi-Narain Jagadeb v. Jadunath Deo (1893) I. L. R. 21 Calc. 504	221
Lumley v. Ravenscroft (1895) L. R. 1 Q. B. 634	344

M

M'Evoy v. The Great Northern Railway Company (1900) 2 I. R. 325	132
Mac'Dermott v. Judges of British Gulana (1868) L. R. 2. P. C. 341	463
Macgill's case (1748) 2 Fowl. 404	496
Mackenzie Lyall v. Chamroo Singh (1889) I. L. R. 16 Calc. 702	56
Mackenzie, M. H. v. Lala Narasingh Sahai (1909) I. L. R. 36 Calc. 762; 10 C. L. J. 113	209, 321
Madho Parshad v. Mehrban Singh (1890) L. R. 17 I. A. 194; I. L. R. 18 Calc. 157	240
Madhu Sudan Sen v. Kamini Kanta Sen (1905) I. L. R. 32 Calc. 1023	209
Mahomed Akil v. Asadunnissa Bibee (1867) 9 W. R. 1; B. L. R. Sup. 774	169
Maharaj Bahadur Singh v. Forbes (1908) I. L. R. 35 Calc. 737; 7 C. L. J. 652	89
Makin v. Attorney-General for New South Wales (1894) L. R. A. C. 57	368, 581
Malkarjun v. Narhari (1900) I. L. R. 25 Bom. 337	628
Mangaldas v. Ranchhodas (1889) I. L. R. 14 Bom. 438	164
Manik v. Bani (1910) 13 C. L. J. 619	252
Manohar Lal v. Jadu Nath (1906) L. R. 33 I. A. 128; I. L. R. 28 All. 585	5, 384
Mason v. Shrewsbury and Hereford Railway Company (1871) L. R. 6 Q. B. 578	131
Matangini Chowdhurani v. Sreenath Das (1903) 7 C. W. N. 552	172
Mati Sheikh v. Balkantha (1913) 18 C. L. J. 269	329
McLeod v. St. Aubyn (1899) L. R. A. C. 549	474
Milani, Sheikh v. Mahomed Ali (1903) 10 C. W. N. 434	167
Milbank v. Revett (1817) 2 Mer. 405	640
Miller v. Knox (1838) 4 Bing. N. C. 574	490
Mohesh Chandra v. Jamiruddin (1901) I. L. R. 28 Calc. 324	616
Mohesh Chunder v. Thakoor Dass (1873) 20 W. R. 425	130
Mohima Chunder v. Jugul Kishore (1881) I. L. R. 7 Calc. 736	47
Mohunt Das v. Nil Komul (1899) 4 C. W. N. 283	362
Mozuffer Hossein, Mahomed v. Kishori Mohun Roy (1895) I. L. R. 22 Calc. 909	184
Mubarak v. Bihari (1894) I. L. R. 16 All. 306	357
Muhammad Khan, Khwaja v. Husaini Begam (1910) I. L. R. 32 All. 410; 14 C. W. N. 865	605

Mungul Pershad v. Grija Kant Lahiri (1881) I. L. R. 8 Calc. 51; L. R. 8 I. A. 123; 11 C. L. R. 113	...	...	...	265
Munnoo Lall v. Lalla Choonnee Lal (1873) 21 W. R. 21 P. C.	...	...	...	30
Munjhoori Bibi v. Akel Mahmud (1913) 17 C. L. J. 316	...	...	...	274
Mutta Vaduganadhan Tevar v. Dorasinga Tevar (1881) L. R. 8 I. A. 99; I. L. R. 3 Mad. 290	...	...	...	395

N

Nadiar Chand Shaha v. Wood (1907) I. L. R. 35 Calc. 194	...	...	...	147
Nanda Lal Goswami v. Jaineswar Halder (1901) 6 C. W. N. 105	...	...	...	545
Naragunty Lutchmeedavamah v. Vengama Naldoo (1861) 9 M. I. A. 66	...	...	...	395
Narainbhai v. Ranchod (1901) I. L. R. 26 Bom. 141	...	...	...	240
Narain Das v. Balgobind (1911) I. L. R. 33 All. 528	...	...	...	214
Narain Koomaree v. Nawab Nazim of Bengal (1865) 4 W. R. 41	...	...	...	450
Narain Roy v. Opnit Misser (1882) I. L. R. 9 Calc. 304	...	...	...	414
Narendra Kumar Ghose v. Gora Chand Joddar (1906) 3 C. L. J. 391; I. L. R. 33 Calc. 683	...	...	...	176
Naro Vinayak v. Narhari (1891) I. L. R. 16 Bom. 125	...	...	...	419
Narsingh v. Jahl (1911) 15 C. L. J. 3	...	...	...	18
Narsing Narain Singh v. Dharam Thakur (1904) 9 C. W. N. 144	...	...	...	545
National Bolivian Navigation Co. v. Wilson (1880) 5 A. C. 176	...	...	...	627
Neill v. Devonshire (1882) 8 A. C. 135	...	...	...	48, 408
Nelson v. Rex (1902) L. R. A. C. 250	...	...	...	369
Net Lal Sahoo v. Sheikh Karim Bux (1896) I. L. R. 23 Calc. 686	...	...	...	628
Nilakant Banerjee v. Suresh Chandra Mullick (1885) I. L. R. 21 Calc. 414	...	...	...	184
Nilkanta Chaki v. Ghatoo Sheikh (1900) 4 C. W. N. 667	...	...	...	197
Nilmani v. Jogendra (1910) I. L. R. 37 Calc. 694; 12 C. L. J. 104	...	...	...	625
Nityananda v. Nanda Kumar (1910) 13 C. L. J. 415	...	...	...	195
Nobin Kishore v. Jogesh Pershad (1870) 14 W. R. 352	...	...	...	450
Nowbut Singh v. Chutter Dharee Singh (1878) 19 W. R. 222	...	...	...	551
Nunda Lal Gossami v. Atarmoni Dass (1908) 12 C. W. N. 432; I. L. R. 35 Calc. 763	...	...	...	196
Nundo Lal v. Nistarini (1900) I. L. R. 27 Calc. 428	...	...	...	586
Nursing v. Roghoobur (1884) I. L. R. 10 Calc. 609	...	...	...	30
Nursing Deb, Raja v. Roy Koylas Nath (1862) 9 M. I. A. 55	...	...	...	33

O

O'Connor v. Foley (1905) 1 I. R. I.	...	...	...	308
Onslow's case (1873) L. R. 9 Q. B. 219	...	...	...	496
O'Shea v. O'Shea (1890) L. R. 15 P. D. 64	...	...	...	473
Owners of the "P. Caland" and Freight v. Glamorgan Steamship Co. Ltd. (1893) L. R. A. C. 207	...	...	...	396

P

Packer v. Peacock (1912) 13 Com. L. R. 577	...	...	...	495
Padapa v. Swami Rto (1900) L. R. 27 I. A. 86; I. L. R. 24 Bom. 556	...	...	...	308

Parameswaram v. Krishnan (1902) I. L. R. 26 Mad. 535	...	...	291
Parbati v. Naunihal Singh (1909) L. R. 36 I. A. 71; I. L. R. 31 All. 412	...	...	60
Parbati Kumari Debi, Srimati, Rani v. Jagdis Dhabal (1901) L. R. 29 I. A. 82; I. L. R. 29 Calc. 433	...	...	201
Parbati Kunwar v. Chandarpal Kunwar (1909) L. R. 30 I. A. 41; I. L. R. 30 Calc. 303	...	...	396
Pareman Dass v. Bhattu Mahton (1897) I. L. R. 24 Calc. 672	...	...	45
Payne v. Cave (1789) 3 T. R. 148; I. R. R. 679	...	...	56
Peary Lal v. Chandli (1905) 5 C. L. J. 80	...	...	628
Peary Mohun Banerjee v. Badul Chandra Bagdi (1900) I. L. R. 28 Calc. 205	...	197,255	
Penn v. Messinger (1791) 1 Yeates (Pa) 2	...	...	494
People v. Oyer and Terminer Court (1886) 101 N. Y. 245; 54 Am. Rep. 691	...	...	496
People v. Placer County Judge (1865) 27 California 151	...	...	494
Perhlah, Rajah Saheb v. Doorga Pershad (1869) 12 W. R. P. C. 6; 12 M. I. A. 286	...	...	28
Pertab v. Unoda (1863) Seves. 754	...	...	451
Petherpermal Chetty v. Muniandy (1903) I. L. R. 35 Calc. 551, 7 C. L. J. 528	...	...	619
Plating Co. v. Farquharson (1831) L. R. 17 Ch. D. 49	...	...	474
Polo v. Leask (1850) 33 L. J. Ch. 155	...	...	627
Porter v. Lopes (1877) 7 Ch. D. 358	...	...	641
Porter v. Taylor (1817) 6 M. & S. 156; 18 R. R. 338; 19 R. R. 675	...	...	626
Prayag Kapri v. Shyam Lal (1903) I. L. R. 31 Calc. 138	...	...	44
Premchand Bural v. The Collector of Calcutta (1876) I. L. R. 2 Calc. 103	...	...	251
President and Governor of the Magdalen Hospital v. Knotts (1879) 4 App. Cases 324	...	...	27
Prit Koer v. Mahadeo Pershad Singh (1894) L. R. 21 I. A. 134; I. L. R. 22 Calc. 85	...	...	234
Promotho Nath v. Nilmani (1911) 15 C. W. N. 902	...	...	27
Protap v. Umrao (1896) 11 C. P. L. R. 1	...	...	625
Pryag Lal, Lala v. Jai Narain Singh (1895) I. L. R. 22 Calc. 419	...	...	47
Puran Chand v. Surendra Narain (1912) 16 C. L. J. 582	...	...	646
Purna v. Dinabandhu (1907) 5 C. L. J. 696; I. L. R. 34 Calc. 811	...	...	628
Purna v. Gopal Lal (1908) 8 C. L. J. 369	...	...	347
Pyari Mohun v. Gopal Paik (1898) I. L. R. 25 Calc. 531	...	...	174

Q

Queen v. Anunto (1874) 14 B. L. R. 294	...	...	586
Queen v. Brompton County Court Judge (1893) 2 Q. B. 195	...	...	469
Queen v. Hosseine (1867) 8 W. R. Cr. 60	...	...	588
Queen v. Itwaray (1874) 14 B. L. R. 51; 22 W. R. Cr. 14	...	...	586
Queen v. Lal Sahai (1888) I. L. R. 11 All. 183	...	...	586
Queen v. Lefroy (1873) L. R. 8 Q. B. 131	...	...	469
Queen v. Maru (1888) I. L. R. 10 All. 207	...	...	586
Queen v. Shewa Bhogta (1874) 14 B. L. R. 294; 23 W. R. Cr. 12	...	...	585
Queen, The, v. Stanger (1871) L. R. 6 Q. B. 352, 40 L. J. Q. B. 91	...	...	453
Queen v. Whitehead (1866) L. R. I. C. C. R. 33	...	...	587
Queen-Empress v. Gobardhan (1887) I. L. R. 9 All. 528	...	...	367

	PAGE.
R	
R v. Brasier (1779) 1 East. P. C. 443	588
R v. Bronington (1893) 2 Q. B. 200	496
R v. Burchett (1722) 1 Strange 567	494
R v. Clement (1824) 4 B. & Ald. 218; 23 R. R. 260, 25 R. R. 710	498
R v. Cooper (1875) 1 Q. B. D. 19	568
R v. Darrington (1826) 2 C. & P. 418	567
R v. Davies (1906) 1 K. B. 32	453
R v. Davison (1821) 4 B. & Ald. 329	490
R v. Dolan (1907) 2 I. R. 260	501
R v. Grey (1900) 2 Q. B. 36	496
R v. Holmes (1861) 2 F. & F. 788	588
R v. James (1822) 5 B. & Ald. 894	498
R v. Lefroy (1873) L. R. 8 Q. B. 134	490
R v. Lloyd (1836) 7 C. & P. 318	581
R v. O'Dogharty (1848) 5 Cox. 348	498
R v. Parnell (1880) 14 Cox. 474	501
R v. Perkins (1840) 2 Moody C. C. 135	588
R v. Skipworth (1873) 12 Cox. 371; L. R. 9 Q. B. 230	498
R v. Stranger (1871) L. R. 6 Q. B. 352	482
R v. Tibbett (1902) 1 K. B. 77	481
R v. Voke (1823) R. & R. 581	580
Radhabani v. Anantrav (1885) I. L. R. 9 Bom. 198	239, 299
Radha Madhab v. Kulpataru (1912) 17 C. L. J. 209	620
Radha Prosad v. Bal Kowar (1890) I. L. R. 17 Calc. 726	83
Radha Prashad Wasti v. Esuf (1881) I. L. R. 7 Calc. 414	240
Raghubir Singh v. Moti Knnwar (1912) I. L. R. 35 All. 41	60
Rajaram Tewaroe v. Luchman Pershad (1869) 12 W. R. 478	239
Raj Mohan v. Alam Gazi (1912) 16 C. L. J. 339	128
*Rajendro Kumar Bose v. Mohim Chandra Ghosh (1894) 3 C. W. N. 763	545
Rajindra Bahadur Singh v. Rani Raghubans Kuar (1908) 11 Oudh cases 256	202
Rajkumar v. Ram Lal (1907) 5 C. L. J. 538	634
Rajrup Koer v. Abul Hossein (1880) I. L. R. 6 Calc. 394	423
Rakhal Moni v. Adwya Prosad (1903) I. L. R. 30 Calc. 613	128
Ramalakshmi v. Silvanatha (1872) 14 Moo. I. A. 570; 17 W. R. 552	559
Ramanath Thakoor v. Eshan Chandra (1863) X Seves. 463	435
Ramaswami v. Bagirathi (1883) I. L. R. 6 Mad. 180	628
Ramaswami v. Kuppaswami (1910) 20 M. L. J. 656	269
Ram Anugra Narain Singh v. Chowdhury Hanuman Sahai (1902) L. R. 30 I. A. 41; I. L. R. 30 Calc. 303	396
Rambux Chittareges's case (1867) 7 W. R. 377	610
Ram Chandra v. Jogendra Nath (1905) 4 C. L. J. 399	33
Ramdayal Giri v. Midnapur Zemindari Co. Ltd. (1910) 15 C. W. N. 263	27
Rameshar Baksh v. Arjun Singh (1900) L. R. 28 I. A. 1; I. L. R. 23 All. 194	33
Rameshar v. Gobardhan (1907) 7 C. L. J. 202	34
Ramessur Proshad, Raja v. Rai Sham Krishen (1901) 8 C. W. N. 257	265
Ram Kawal v. Ram Kishore (1895) I. L. R. 22 Calc. 506	633

	PAGE.
Ram Mohan v. Koch (1905) I. L. R. 32 Calc. 386	263
Ram Moyi v. Rupai Pasamanick (1905) 3 C. L. J. 267	272
Ram Nandan v. Sheoparsan Singh (1910) 11 C. L. J. 623	613, 644
Ram Nundun Singh v. Maharani Janki Koer (1902) L. R. 29 I. A. 178	395
Ram Narain Singh v. Lachmi Narain Deo (1912) 12 C. L. J. 239, 17 C. W. N. 408	125
Ram Pershad v. Lakhpati Koer (1912) I. L. R. 30 Calc. 231; 7 C. W. N. 162; L. R. 30 I. A. 1	349
Ram Prasad, Chowdhury v. Chowdhury Pawan Singh (1907) 18 C. L. J. 97	115
Ram Protap Singh v. Chutta Singh (Sa. 239 of 1899) decided by Banerjee and Stevens J. J. on 12th June 1899 unreported	136
Ram Ranjan v. Indra Narain (1906) I. L. R. 33 Calc. 890	133
Ram Ranjan v. Ram Narain (1894) I. L. R. 22 Calc. 533	290
Ramsden v. Fairthrop (1863) 1 N. R. 389	640
Ram Sona v. Sona Mala (1911) 13 C. L. J. 404	632
Rana Jit v. Jogendra (1912) 16 C. L. J. 516	142
Rangoon Botatoung Company, Limited, The v. The Collector, Rangoon (1912) 16 C. L. J. 245, I. L. R. 40 Calc. 21; 16 C. W. N. 961	123
Rasamay v. Srinath (1902) 7 C. W. N. 102	195
Rashid-un-Nisa v. Muhammad Ismail (1909) 10 C. L. J. 102	195
Reasut Hossein v. Hadjee Abdoolah (1876) L. R. 3 I. A. 221; I. L. R. 2 Calc. 131	40, 46, 154
Reg v. Bertrand (1867) L. R. 1 P. C. A. C. 520	368
Rewa Prasad Sukal v. Deo Dutt Ram Sukal (1899) L. R. 27 I. A. 39; I. L. R. 27 Calc. 515	235
Rex v. Clarke (1910) 103 L. T. 636	469
Rex v. Doolen (1907) L. R. 260	474
Rex v. Gray (1900) 2 Q. B. 36	474
Rex v. Malapa Bin Kapana (1874) 11 B. H. C. R. 196	367
Rex v. Parks	478
Roshun Lal v. Ram Lal Mullick (1904) I. L. R. 30 Calc. 262	145
Rukiminimayi Dasi v. Purnu Chandra Bhera (1910) I. L. R. 39 Calc. 341; 15 C. L. J. 334	129
Rup Chand, Lala v. Jambu Parshad (1910) L. R. 27 I. A. 93; 11 C. L. J. 454; I. L. R. 32 All. 247	70

B

Sadabart Prasad v. Foolbush Koer (1869) 3 B. L. R. F. B. 31; 12 W. R. 1 F. B.	344
Sajjibullah Sircar v. Hazl Khosh Mohamed Sircar (1886) I. L. R. 13 Calc. 264	47
Sajjad Husain v. Wasir Ali (1912) L. R. 39 I. A. 156; I. L. R. 34 All. 455; 16 C. L. J. 613	71, 396
Sankarnath Pandit v. Madan Mohan Das (1909) 11 C. L. J. 61	139
Sandford v. Ballard (1861) 30 Beav. 109 (1864) 33 Beav. 401	641
Sarabjit v. Indarjit (1904) I. L. R. 27 All. 203	562

Sarat Chandra v. Kshitish Chandra (1910) 12 C. L. J. 216	...	400
Sarat Chandra Ghosh v. Shyam Chand Singha (1906) 10 C. W. N. 930	...	195
Sarat Mani Debl v. Bata Krishna Banerjee (1909) 10 C. L. J. 336	...	125
Searf v. Jardine (1882) 7 A. C. 345	...	627
Scott v. Scott (1913) 29 T. L. R. 520	...	496
Searle v. Clwate (1884) 25 Ch. D. 723	...	361
Secretary of State for India v. British India Steam Navigation Co. (1911) 13 C. L. J. 90; 15 C. W. N. 848	...	125
Secretary of State v. Krishnamoni (1902) 1 L. R. 39 Calc. 515; L. R. 29 I. A. 104	...	275
Seeb Krišto v. East India Co. (1856) 6 M. I. A. 26	...	450
Seshamma v. Chickaya (1902) 1 L. R. 25 Mad. 507	...	291, 555
Sewdeo Narain v. Ajodhya Prosad Singh (1912) 1 L. R. 39 Calc. 1005	...	634
Shama Purshad Roy Chowdhury v. Hurro Purshad Ray Chowdhury (1865) 10 M. I. A. 203	...	209, 226
Sham Chand v. Brojonath (1873) 21 W. R. 94, 12 B. L. R. 484	...	272
Shamsher, Mirza v. Kunj Behari (1907) 7 C. L. J. 417, 12 C. W. N. 273	...	275
Sharat Sundari v. Bhubo Prosad (1886) 1 L. R. 13 Calc. 101	...	414
Sheo Prosad v. Hira Lal (1889) 1 L. R. 12 All. 440	...	628
Sheo Sohye Roy v. Luchmeswar (1884) 1 L. R. 10 Calc. 577	...	414
Shipworth's case (1873) L. R. 9 Q. B. 282	...	470
Simpson v. Godmanchester Corporation (1897) A. C. 696	...	132
Skipworth's case (1873) L. R. 9 Q. B. 230	...	496
Smith v. Wilkins (1833) 6 C. & P. 180	...	304
Sobhanadri's Case, Sri, Rajah (1902) 1 L. R. 26 Mad. 403	...	290
Soni Ram, Lala v. Kanhaiya Lal (1913) 17 C. L. J. 488; 1 L. R. 35 All. 227, L. R. 40 I. A. 74	...	274
Spencely v. Willmot (1806) 7 East. 108	...	304
Spratt v. Ahearne (1834) 1 Jones 50	...	640
Srimant Ray v. Mahadeo Mahata (1904) 1 L. R. 31 Calc. 550	...	89
Srinibas v. Ram Chandra (1911) 14 C. L. J. 146; 15 C. W. N. 921	...	584
Srinivasa Ayyar v. Muthusami Pillai (1900) 1 L. R. 24 Mad. 246	...	555
Srinivasa Prosad Singh v. Kesho Prosad Singh (1911) 13 C. L. J. 125	...	681
Stanley v. White (1811) 14 East. 332	...	408
State v. Frew (1884) 24 W. Va. 416; 49 Am. Rep. 257	...	491
State v. Knight (1893) 3 S. D. 509; 44 Am. St. Rep. 809	...	496
State v. Shepherd (1903) 177 Ms. 205; 99 Am. St. Rep. 624, 76 S. W. 79	...	491
Stavely v. Uzilely (1862) 2 Fos & Finl 30	...	627
Street v. Aderton (1793) 4 Brown C. C. 414	...	641
Sundarabai Saheb v. The Collector of Belagaum (1908) 1 L. R. 33 Bom. 256	...	644
Surendra Mohan v. Surnomoyi (1896) 1 L. R. 26 Calc. 103	...	30
Surendra Nath v. The Chief Justice and Judges of the High Court (1883) 1 L. R. 10 Calc. 109; L. R. 10 I. A. 171	...	453
Surut Soonduree Dassee v. Prosunno Coomar Tagore (1870) 15 W. R. 20 P. C. ...	...	221
Surya Narain v. Jogendra Narain (1892) 1 L. R. 20 Calc. 360	...	44
Sutton v. Toomer (1827) 7 B. & C. 416	...	354
Swami Rao v. Padapa (1892) 1 L. R. 18 Bom. 22	...	308

T

Tarini Churn v. Crawford (1905) I. L. R. 32 Calc. 1141	...	...	...
Teasdale v. Sanderson (1864) 33 Beav. 534	...	...	641
Tejendro Narain v. Bakai Singh (1895) I. L. R. 22 Calc. 658	...	...	74, 95
Tekachnee Goura v. Saroo (1873) 19 W. R. 252	...	...	28
Thakamani Dasi v. Mohendra Nath Dey (1909) 10 C. L. J. 463	...	...	81
Thames Conservatory v. Smeed & Co. (1897) 2 Q. B. 334	...	...	399
Thamman Pande v. The Maharaja of Vizianagram (1907) I. L. R. 20	...	...	...
All. 593	...	...	415
Tichborne v. Tichborne (1870) 39 L. J. Ch. 398	...	...	498
Tichborne v. Weir (1892) 67 L. T. 735	...	...	308
Tilukdhari Singh v. Chulhan Mahton (1889) I. L. R. 17 Calc. 131	...	...	83
Tindall v. West Cott (1900) 113 Georgia 1114; 55 L. R. A. 225	...	...	491
Titu Bibi v. Mohesh Chandra Bagchi (1883) I. L. R. 9 Calc. 683	...	...	173
Tomluddin v. Khoda Nawaz (1909) 11 C. L. J. 16; 14 C. W. N. 229	...	...	257
Touche v. Metropolitan Railway Warehousing Company. (1871) L. R. 6	...	...	...
Ch. 677	...	...	611
Tulshi Pershad Singh v. Ram Narain (1885) L. R. 12 I. A. 205; I. L. R. 12	...	...	...
Calc. 117	...	...	34
Twiddle v. Atkinson (1861) 1 B. & S. 393	...	...	604
Tyson v. Fairclough (1824) 2 Sim & St. 142	...	...	640
Tyson v. Smith (1838) 9 Ad. & E. 406; 48 R. R. 593	...	...	561

U

Ulfat Hussain v. Gayani Dass (1909) I. L. R. 36 Calc. 802	...	...	33
Umar Khan v. Zia-ud-din (1911) L. R. 39 I. A. 19; I. L. R. 39 Calc. 418	...	...	238
Umjad Ali Khan, Nawab v. Musummat Mohumdu Begum (1867) 11	...	...	...
M. I. A. 517	...	...	60
Unrao Chand v. Briudrabhan Chand (1895) I. L. R. 17 All. 475	...	...	644
Unnoda Churn Das v. Mathura Nath Das (1879) 4 C. L. R. 6; I. L. R. 4	...	...	...
Calc. 860	...	...	173
United States v. Hudson (1812) 7 Cranch. 32	...	...	494

V

Vesanti v. Lallu (1885) I. L. R. 9 Bom. 285	...	...	308
Vayidinada v. Appu (1881—5) I. L. R. 9 Mad. 44	...	...	562
Venkata v. Sobhanadri (1905) L. R. 33 I. A. 46; I. L. R. 29 Mad. 52	...	...	306
Venkata Narasimha Appa Rao, Raja v. Raja Narayya Appa Rao (1879) L. R. 7	...	...	...
I. A. 38; I. L. R. 2 Mad. 128	...	...	393
Venkatarami v. Stridavamma (1886) I. L. R. 10 Mad. 179	...	...	42
Vibudhapriya Tirthaswami v. Yusuf Sahib (1905) I. L. R. 28 Mad.	...	...	...
380 (383)	...	...	145
Virupakshappa v. Sidappa (1901) I. L. R. 26 Bom. 109	...	...	4
Voorhees v. Albright (1879) 28 Fed. Cas. 1699	...	...	491

W

Walia v. Banke Behari Pershad Sing (1903) I. L. R. 30 Calc. 1021	...	22
Warlow v. Harrison (1859) 1 E. & E. 309, 28 L. J. Q. B. 21	...	...
29 L. V. Q. B. 14	...	56
Warrington v. Early (1853) 2 E. & B. 763	...	354
Watson v. Williams (1850) 36 Mis. 341	...	490
Wentworth v. Bullen (1892) 9 B. and C. 840	...	188
Wheeler v. United States (1894) 159 U. S. 523	...	587
Wood, V. Agent to the Assam Bengal Ry. Company v. Meher Ali Bepari (1908) 13 C. W. N. 24	...	147
Woodoyadutto v. Mukoond (1874) 22 W. R. 225	...	33
Woodward v. Buchanan (1870) L. R. 5 Q. B. 285	...	304

Y

Yanumula Venkayamah, Shree Rajah v. Shree Rajah Yanumula Boochia Vankondra (1873) 13 M. I. A. 333	...	395
Yarlagadda Millikarjuner, Srimantu Raja v. Srimantu Raja Yarlagadda Durga (1890) L. R. 17 I. A. 154; 1 L. R. 13 Mad 406	...	393

Z

Zemindar of Merangi v. Sri Rajah Satrucharla Ramabhadra Raxu (1891) L. R. 18 I. A. 45; 1 L. R. 14 Mad. 237	...	396
Zohra Bibi v. Zobeda Khatun (1910) 12 C. L. J. 368	...	614
Zulfun Beebee v. Radhica Chunder (1878) 1 C. L. R. 388	...	27

The Calcutta Law Journal Reports.

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GANESHA ROW

v.

TULJARAM ROW AND ANOTHER.

P. C.

1918.

March 4 & April, 8.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS].

Hindu Law—Suit for partition—Joint Hindu family—Father as guardian ad litem of his minor son—Father's powers to compromise—Code of Civil Procedure (Act XIV of 1882) Sec. 482—Sanction of Court.

Where a Hindu father is party to a partition suit and is himself the next friend or guardian of his minor son, who is also a party to the suit, the father's powers to bind the minor son by a compromise of the suit are controlled by section 482 of the Code of Civil Procedure, 1882, and he cannot do any act in his capacity of father or managing member which he is debarred from doing as the next friend or guardian without the leave of the Court.

Where in a suit for partition of joint Hindu family property, a father was party and was himself the guardian *ad litem* of his minor son (also a party to the suit), the decree directed that certain monies should be paid to the father, who afterwards under a compromise entered satisfaction of the decree:

Held, that the fact that monies were made payable to the father who was admittedly representing his branch of the family, made no difference in the duty which lay on him to obtain the leave of the Court to a compromise which was clearly intended to affect the rights and interests of his son; and that as no leave was obtained from the Court in regard either of the compromise or the satisfaction entered thereunder of the decree, they were not binding on the son, who must be remitted to his original rights under the decree.

Appeal from a judgment and decree of the High Court of Madras (September 28, 1909) affirming those made in the exercise of its Original Civil jurisdiction (September 2, 1908.)

The parties in this case were Hindus and the suit giving rise to the appeal was instituted by the appellant, as plaintiff, who was the son of Rajaram the second defendant-respondent, and the nephew of Tuljaram the first defendant-respondent.

P. O.

1912.

Gaemaha Row

v.
Tuljaram Row.

The appellant alleged that after a decree had been passed in a partition suit against the first respondent and in favour of the second respondent as representing himself and his branch of the family ordering the first respondent to pay a sum of Rs. 86,000 odd with future interest to the second respondent, the latter entered into a compromise with the former and in pursuance of such compromise entered up satisfaction of the decree. The appellant, who was a party to the partition suit, was a minor at the time and his father was appointed his guardian *ad litem*. The appellant complained that no leave was obtained from the Court in regard either of the compromise or the entering up of satisfaction of the decree and claimed that they were not binding on him. The appellant also alleged that there was no consideration for the compromise and challenged it as fraudulent. The learned Judge, who tried the suit dismissed it holding that the compromise was binding on the appellant and that there was consideration, which consisted in the withdrawal by the first respondent of his then pending appeal against the decree in question, that the compromise in question along with two other must be regarded as a family arrangement, and no ground has been shown for re-opening such an arrangement, and that no sanction of the Court was required under section 462 of the Code of Civil Procedure, 1882, as the money under the decree was payable personally to the appellant's father, who acted in his personal capacity in entering into the compromise. This decision was affirmed on appeal by two learned Judges of the appellate Court for the following reasons :

"It is contended before us that as the plaintiff was a minor defendant in that suit any compromise entered into by the second defendant his father, who was his guardian *ad litem* is not binding on him, as the sanction of the Court was not sought for and obtained. It is argued that though a *bona fide* compromise by a father or a managing member of a family of a disputed claim may be in certain circumstances binding on the minor members of the family, yet when the minor is a party to the suit, he will not be bound by a compromise entered into by his father, appointed by the Court guardian *ad litem*, without the sanction of the Court ; nor will he be bound by any such compromise even when a person other than the father or guardian under Hindu Law is the guardian *ad litem*, because it is urged that when a guardian is appointed by the Court the minor becomes a ward of Court and any power which his father or any other

person may have to bind his interest in any property in a pending suit is put an end to. We feel that there is great force in this contention, and if it were necessary to decide the question, we should hesitate to hold that a minor would be bound by any compromise with reference to such property without the sanction of the Court.

"In this case, however, a decree has been passed determining the rights of the parties and the decree made the money (Rs. 86,000) payable to the plaintiff's father the third defendant in that suit. No sum was payable to the plaintiff who was the sixth defendant in that suit. It is, no doubt, true that the money was by virtue of the Hindu Law, payable to the plaintiff's father as the representative of the branch of the family consisting of himself and his descendants, whether or not they were parties to the suit, and he was entitled to receive it only as ancestral property not as separate property. But so far as the question before us is concerned he was the sole decree-holder entitled to execute the decree or enter up satisfaction.

"Section 462, Civil Procedure Code, only precludes the next friend or guardian for the suit 'from entering into any agreement on behalf of a minor' without leave of the Court. If therefore, some other person had been the minor's next friend or guardian for the suit, then the plaintiff's father, could have entered into the agreement now in question with Tuljaram the judgment-debtor on his own behalf without any reference to section 462, Civil Procedure Code. His appointment as guardian *ad litem* would not deprive him of his capacity to act on his own behalf. But as the money was made payable to him only as the representative of the family of which he is the head, the compromise he entered into, will be binding on the other members, including the plaintiff, only if it is a *bona fide* compromise of a disputed claim. The learned Judge has held that this agreement (A A) was part of a family settlement which put an end to the disputes between all the members of the family and enabled the heads of the three branches of the family which thenceforth became divided from one another—the fourth being represented by a widow—to carry on in partnership the valuable business of the Scottish Press which would have been jeopardized by further quarrels. The plaintiff has not given any oral evidence. The documentary evidence has been read to us. It certainly shows that Tuljaram believed that he had good grounds for appealing against the decree in the suit. He had competent

P. O.

1918.

Ganesha Row

v.

Tuljaram Row.

P. C.

1918.

Ganesh Row

Tuljaram Row.

counsel to advise him. The correspondence also shows that the matters in dispute were discussed fully between the parties and their advisers. The main questions raised in appeal as to the ownership of the half share of the Scottish Press which was purchased in Tuljaram's name and his liability for failure to collect over a lac of Rupees due to the family were undoubtedly substantial questions. The withdrawal of his appeal was, therefore, in our opinion good consideration to justify the plaintiff's father in entering into the compromise. The terms of the compromise differed as between the parties because the circumstances were different. We are, therefore, unable to treat the release (A A) as a gift by the plaintiff's father to his brother Tuljaram being of the opinion therefore that the agreement is binding on the plaintiff, we dismiss the appeal with costs."

DeGruyter, K. C. (Brown with him), for the Appellant : The decree in the partition suit under which the first respondent was ordered to pay a certain amount to the second respondent, was made in his favour as representing his branch of the family, of which the appellant was admittedly a member. The compromise, therefore, affected the appellant's rights and required the sanction of the Court under section 462 of the Code of Civil Procedure, 1882. It is admitted that there was no sanction and consequently the compromise is not binding on the appellant. If it be contended that the appellant's father was not acting on behalf of the minor in entering into the compromise, then in that case there is no compromise as far as the appellant's interest is concerned.

(Counsel was stopped).

Sir H. Erle Richards, K. C. and Dunne, for the first Respondent. Section 462 of the Code of Civil Procedure was intended to cover a class of cases in which the minor has an immediate interest in the subject matter of the compromise.

But here he had no interest in the decree made in the partition suit and consequently the section in question has no application. The present case is distinguished from the case of *Virupakshappa v. Sidappa* (1) where the minor was given a share under the decree. A father can bind his minor son by a compromise of a disputed claim without having a guardian for the minor, who need not be a party to the agreement and it is submitted that the section in question does not control the father's powers

to compromise suits when the compromise does not affect the minor's interest.

Their Lordships intimated that the compromise in question came within section 462 and called upon counsel to argue the case as regards the relief to be granted to the appellant in the present appeal.

P. O.

1918.

Ganesha Row

v.

Tuljaram Row.

De Gruyther, K. C. referred to *Manohar Lall v. Yadu Nath Singh* (1) and submitted that there should be a declaration that the compromise and the satisfaction entered up thereunder are not binding on the appellant, who should be remitted to his rights under the decree in the partition suit.

Sir H. Erle Richards, K. C. and *Dunne*, submitted that the compromise was binding on the appellant's father in respect of his own share.

De Gruyther, K. C., in reply, further referred to section 562 of the Code and submitted that the case should be sent back to the High Court for trial of other issues.

The judgment of their Lordships was delivered by

Mr. Ameer Ali.—This is an appeal from a judgment and decree of the High Court of Madras, dated the 28th of September 1909, which, affirming a decree made in the exercise of its Original Civil Jurisdiction on the 2nd of September 1908, dismissed the plaintiff's suit.

April, 8.

The facts which have given rise to the present action relate back to the year 1886. The defendants Tuljaram and Rajaram are two brothers, being the sons of one Venkata Row, who died in 1871. Tuljaram and Rajaram, with two other sons of Venkata Row named respectively Rama Chandra Row, since deceased, and Lachmana Row, formed a joint undivided Hindu family. In 1881 there was a dissolution of the joint family and a partial division of the family property. A large proportion of the assets was, however, left undivided in the hands and under the control of Tuljaram, the first defendant, who seems to have been the managing member of the family in respect at least of the business or businesses in Madras.

In 1886 a suit was brought on the original side of the High Court of Madras by Athmaram, the son of Lachmana Row, against Tuljaram for ascertainment of the remaining undivided family assets in his hands, for accounts and partition and other reliefs. This seems shortly to have been the general scope of the action instituted in 1886, in which Rajaram, the present plaintiff's

(1) (1906) L. B. 83 I. A. 128, (181 and 182), I. L. R. 28 All. 585.

P. O.

1918.

Ganesh Row

v.

Tuljaram Row.

Mr. Anwar Ali.

father, and other surviving members of Venkata Row's family were parties. The plaintiff, Ganesh Row, who was not born at the time of the institution of the suit, was added as defendant on his birth in December 1887, and by an order dated the 20th November 1888, his father Rajaram was appointed his guardian *ad litem*.

On the 14th of January 1892 a preliminary decree was made declaring the rights of the parties and directing accounts against Tuljaram.

By the final decree made on the 21st of October 1896 and a subsequent order of the 17th of August 1897, he was declared accountable to the family for a considerable sum of money, the share of the plaintiff's branch in the total sum being, according to the High Court, about Rs. 86,000. Tuljaram appears to have filed an appeal from the final decree of the first Court, and during its pendency he entered into agreements with the adult parties to the suit by which they either abandoned their claims, as in the case of the plaintiff's father, or compromised them for smaller sums.

Rajaram's agreement, which is dated the 21st of November 1897, recites that he "acting for himself and as guardian for his minor son Venkat Row" (another name for the plaintiff) "with a view to terminate the litigation that had been going on in the family for the past eleven years and more, and to make an amicable settlement of all matters in dispute between the several members of the family," and in consideration of the defendant Tuljaram consenting to withdraw his appeal, Rajaram agreed to "relinquish and disclaim for himself and for his minor son Venkat Row" the several sums of money for which Tuljaram was found liable to Rajaram's branch, and "to release and discharge Tuljaram from all liability in respect thereof to himself and to his minor son Venkat Row." And on the 25th of November 1897, Rajaram instructed the Registrar of the High Court "to enter up the satisfaction of the decree" in respect of the several sums which amounted in the aggregate to something like Rs. 86,000. Tuljaram also on his side withdrew the appeal he had preferred against the decree. Admittedly no leave was either applied for or obtained from the Court in regard either of the agreement or the entering up of satisfaction of the decree.

Matters remained in this condition until the plaintiff attained his majority. After some preliminary proceedings to which it is unnecessary to refer for the purposes of this judgment, he

brought this suit on the 7th of November 1906 to recover from the defendant Tuljaram on the basis of the decrees in the suit of 1886 a sum of Rs. 1,60,000 principal and interest.

Rajaram was also made a defendant in this action, and his acts relating to the agreement and the satisfaction entered under it were challenged as fraudulent, without consideration and not binding on the plaintiff, having been made without leave of the Court.

The learned Judge on the Original Side of the High Court who tried the case was of opinion that the suit was not maintainable in view of the provisions of section 244 of the Code of Civil Procedure. Treating it, however, as an application under that section, he dealt with the matter on its merits.

He held that the compromise entered into by Rajaram was binding on the plaintiff, and that it was supported by consideration which consisted in the withdrawal by Tuljaram of his appeal. The principal ground of his judgment is to be found in the following passage :

In this case under the terms of the decree the money in respect of which the agreement (AA) was arrived at and satisfaction entered up was made payable to the third defendant personally and not to the minor sixth defendant. If the minor had been represented by another guardian *ad litem* the third defendant could just as well have made the compromise and entered up satisfaction of the amount payable to him under the decree, and it could not have been suggested that section 462 was applicable to the case. It makes no difference in my opinion that the third defendant happened to be the guardian *ad litem* of the sixth defendant because in making the compromise and entering up satisfaction he was not acting as guardian *ad litem* on behalf of the minor sixth defendant but as the third defendant in the suit.

The learned Judge accordingly dismissed the plaintiff's suit, and his judgment has been affirmed on appeal by the High Court in its Appellate Jurisdiction. With regard to the invalidity of Rajaram's acts as affecting the plaintiff's rights, the learned Judges in the appellate Court have taken the same view as the first Court, that Rajaram, in entering into the compromise, acted in his personal capacity, which they considered him competent to do as "his appointment as guardian *ad litem* would not deprive him of his capacity to act on his own behalf." They were further of opinion that "as the money was made payable to

P. O.

1918.

Ganesha Row

,

Tuljaram Row.

Mr. Anwar Ali.

P. O.

1918.

Ganesh Row

Tulharam Row.

Mr. Anwar Ali.

him only as the representative of the family of which he is the head, the compromise he entered into will be binding on the other members, including the plaintiff, only if it is a *bona fide* compromise of a disputed claim."

It seems to their Lordships that there is a fallacy underlying the reasoning on which the Courts below have proceeded. No doubt a father or managing member of a joint Hindu family may, under certain circumstances and subject to certain conditions, enter into agreements which may be binding on the minor members of the family. But where a minor is party to a suit and a next friend or guardian has been appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the Court. Section 462 of the Code of Civil Procedure expressly provides that—

No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian.

The Courts in India seem to think that because Rajaram was a party to the suit of 1886 and was also guardian *ad litem* for his minor son, who was a member of the joint family whom Rajaram was representing, it was open to him to enter into the compromise in his personal capacity, and as it was a *bona fide* settlement of a disputed claim, it became binding on the minor by virtue of his having acted as the managing member of the family. How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian *ad litem*, is a question which does not arise in the case, and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment.

The learned Judges, however, seem to have lost sight of the fact that the agreement, which is challenged in this case, was entered into by Rajaram not only on his own behalf but also on behalf of his minor son, for whom he was guardian in the suit. Their Lordships are of opinion that in view of the provisions of

section 462, he had no authority to enter into any compromise or agreement purporting to bind the minor.

In their Lordships' judgment the fact that the moneys were made payable to Rajaram, who was admittedly representing his branch of the family, makes no difference in the duty which lay on him to obtain the leave of the Court to an agreement which was clearly intended to affect the rights and interests of his son.

Their Lordships are of opinion that there should be a declaration in this case that the agreement of the 21st November, 1897, and the satisfaction entered thereunder are not binding on the plaintiff and that he is remitted to his original rights under the decrees in the suit of 1886.

Their Lordships will, therefore, humbly advise His Majesty that the decree and judgment of the High Court should be set aside, that a declaration should be made in the terms stated, and that the case should be returned to the High Court to deal with the other questions covered by issues Nos. 6 and 7 arising between the parties.

The respondent Tuljaram will pay the costs of the appeal to the High Court in its Appellate Jurisdiction and the costs of this appeal. The costs of the trial on the Original Side of the High Court, and those which will be incurred in the future proceedings, will abide the result of those proceedings.

Douglas Grant.—Attorney for the Appellant.

John Fosselyn.—Solicitor for the first Respondent.

J. M. P.

Appeal allowed: case remanded.

PRESENT: *Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.*

RAJA DEBI BAKHSH SINGH

v.

HABIB SHAH.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Suit, maintainability of—Suit, dismissal of, for default—Plaintiff, death of—Code of Civil Procedure (Act V of 1908), Sec. 151 and Order 22, Rule 3—Mistake—Court's inherent power—Legal representative—Application for substitution—Limitation Act (IX of 1908), Sch. I, Art. 176.

Where the fact that the plaintiff was dead was unknown to the Judge, who dismissed the suit for non-appearance of the plaintiff and the deceased plaintiff's son applied within the period of six months' limitation under the Indian Limitation Act, Sch. I, Art. 176 to have his name substituted in place of his deceased father under the Code of Civil Procedure, Order 22, Rule 3:

P. O.

1918.

Ganeaha Bow

Tuljaram.

Mr. Ameer Ali.

P. O.

1918.

April 16, 1919.

P. C.

1913.

Debi Bakshah

v.

Habib Shah.

Held, that the Rules or Orders of the Code dealing with the case of non-appearance of a suitor were inapplicable to the situation which arose when the suitor was dead, that upon being pointed out the mistake it was the duty of the Court to rectify it, and that the application for substitution should be granted and the suit proceeded with.

Held, also, that quite apart from section 151 of the Code of Civil Procedure 1908 the Court possessed an *inherent power* to rectify the mistake which had been inadvertently committed, but that section could be properly invoked and, apart from points of procedure and otherwise, should be taken advantage of.

The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead or the ranking of death under the category of default, is not stateable.

Ex parte appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh, dated the 5th December 1911 affirming on review in a judgment and decree dated the 20th February 1912, which reversed an order of the Court of the Deputy Commissioner of Bahraich dated the 11th September 1911.

The question for determination was whether the appellant could maintain the present suit or not.

The material facts are stated in the judgment of their Lordships.

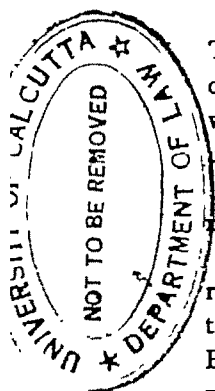
De Gruyther, K., C., and S. A. Kyffin, for the Appellant: The plaintiff had died about a fortnight before the suit came on for hearing on July 4, 1911, when the Deputy Commissioner, who was not aware of the fact, dismissed the suit for default under Order 9, Rule 8.

[LORD MOULTON: The Court cannot dismiss a suit for non-appearance where the plaintiff is dead.]

It was a mistake and the Deputy Commissioner was right in rectifying it. At any rate, any defect in procedure was cured by the powers conferred on him by section 151 of the Code of Civil Procedure, 1908. The application under Order 22, Rule 3 was made within the period of six months' limitation under the Limitation Act, 1908, Sch. 1, Art. 176, and it is submitted that the order of the Deputy Commissioner is right and should be restored. But the Court of the Judicial Commissioner says that the appellant ought to have applied under Order 9, Rule 9 to set aside the order for dismissal.

[LORD MOULTON: It has nothing to do with the case.]

Even if it were applicable, it is evident that the Deputy Commissioner accepted the appellant's application. His action amounts to the exercise of his discretionary powers under section 5 of the Limitation Act, 1908 to extend the period



of 30 days' limitation, and the Court of appeal was wrong in reversing the order of the Deputy Commissioner on the ground that the application was barred by limitation. The Deputy Commissioner says that a report of the succession was made under Act III of 1901 (U. P.) section 34, cl. 5 and the finding of the Judicial Commissioner to the contrary is erroneous.

The respondent did not appear.

On April 16, 1913 their Lordships said that they would humbly advise His Majesty that the appeal should be allowed and would deliver in due course the reasons for their report, which were delivered on April 29, 1913 by

Lord Shaw.—The appellant's father, Raja Muneshar Bakhsh Singh, instituted a suit against the respondent for payment of sums amounting to Rs. 15,908. The plaint was filed on the 3rd May 1911, in the Court of the Deputy Commissioner of Bahraich. The respondent filed his written statement on the 31st May 1911. On the 4th July the following occurred before the Deputy Commissioner: "On the case being called to-day the plaintiff was not present. I therefore dismiss the claim. Costs upon plaintiff."

The fact, unknown to the Deputy Commissioner, was that the plaintiff was dead. He had died about a fortnight before, namely, on the 21st June. It is plain to their Lordships that upon this being pointed out, it was the duty of the Deputy Commissioner to rectify the situation. This duty Mr. Clarke, the Deputy Commissioner, seems fully to have recognised. It requires no words of their Lordships to show the inapplicability of Rules or Orders dealing with the case of the non-appearance of a suitor to the situation which arises when the suitor is dead. The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead, or the ranking of death under the category of default, does not seem to be very stateable.

The deceased plaintiff's son took the proper steps to have his name substituted in place of his deceased father under Order 22, Rule 3 of the Civil Procedure Code. He did so on the 3rd August, which was well within the period of six months' limitation under Article 176 of the first schedule of the Indian Limitation Act of 1908. Some question arose as to the application being time-barred, but the latter was very properly accepted by Mr. Clarke. The appellant had also taken the proper steps to have a report of his succession made under section 34 of the Rent Act.

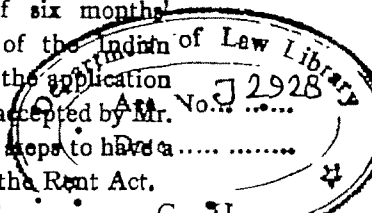
P. C.

1913.

Debi Bakhsh

Habib Shah.

April, 20.



P.O.

1918.

Debi Bakhsh

Habib Shah,

Lord Shahr,

On the 11th September 1911 the Deputy Commissioner pronounced the following order :

"The case was dismissed as no one appeared on the previous hearing. This was due to the death of the Raja of Mallanpur. The other side claim that the re-hearing is barred under section 34 of the Rent Act, but that section clearly requires a report of the succession, which has already been made. It is argued that the application is time-barred, but it was filed and accepted under my order within time. But I cannot allow any technicality to obscure the fact that the case was only not heard because of the calamity which prevented applicant's putting up this case. Under these circumstances I accept this application and fix 27th October for hearing of issues, if necessary, and proof."

This order by the Deputy Commissioner is so manifestly sensible and correct that their Lordships are of opinion that it ought to be reverted to, and the case proceeded with accordingly.

On the 5th October 1911, however, the Court of the Judicial Commissioner of Oudh reversed the Deputy Commissioner's order, and on the 20th February 1912, on review, that judgment was affirmed. In their Lordships' opinion these judgments cannot stand, being vitiated by applying to a dead man Orders and Rules applicable to a defaulter. By the Code of Civil Procedure, section 151, it is provided that "nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court." In their Lordships' opinion such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from section 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But section 151 could never be invoked in a case clearer than the present, and their Lordships are at a loss to understand why, apart from points of procedure and otherwise, it was not taken advantage of.

Their Lordships have humbly advised His Majesty that the appeal be allowed, the order appealed from set aside and the order of the Deputy Commissioner of the 11th September 1911 restored, and that the appellant be found entitled to the costs of the proceedings since the 3rd August 1911, in India, and to the costs of this appeal. The suit will be remitted to India to be disposed of on the merits.

T. D. Wilson & Co.—Solicitor for the Appellant.

The Respondent did not appear.

J. M. P.

Appeal allowed.

PRESENT: *Lord Atkinson, Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.*

JOOPOODY SARAYYA AND OTHERS

v.

PULAVARTI LAKSHMANASWAMY.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Partnership business, claim for a share of—Dissolution—Evidence—Accounts—Presumption—Conduct of parties—Limitation—Indian Limitation Act (XV of 1877), Sch. II, Art. 106.

P. C.

1918.

*February, 26, 27.
March, 19.*

Where in a suit brought in 1902 for a share in a partnership business it was proved that since the establishment of the partnership in 1868 down to 1891 annual accounts suitable as those of a current partnership business were regularly rendered between the contending parties, and that those accounts entirely ceased in 1891 in which year the account furnished was a capital account showing a complete division of the partnership shares :

Held, that the presumption was for dissolution in 1891 ; that the fact that the subsequent conduct of the parties was consistent only with dissolution put it beyond doubt that the partnership was dissolved in 1891 ; and that the suit was barred by the three years' limitation provided by the Indian Limitation Act, Sch. II, Art. 106.

Appeal from a judgment and decree of the High Court of Judicature at Madras, dated the 10th December, 1908, reversing a judgment and decree of the Additional Subordinate Judge of Godavary, Rajahmundry, dated the 16th September, 1905.

The main questions for determination on this appeal were as to whether the appellants were entitled to an account of a partnership business carried on at Akuvidu, and to recover their share of the assets and property thereof, or whether their claim was barred by limitation,

The appellants, and the first defendant, who were members of a Hindu joint family carried on a business at Kottapally and also another business in partnership with Venkanna, the second defendant at Akuvidu. Venkanna was the sole manager of the latter business which was started in about 1868.

A partition was made in 1891 of the Kottapally business and properties amongst the members of the said joint family.

On the 19th December, 1902, the appellants instituted the present suit, against the first defendant Sri Ramamoorthy, the said Venkanna (since deceased) and Lakshmanaswamy, his adopted son the sole respondent.

By their plaint they prayed as against the said Venkanna and the respondent that the said Akuvidu partnership should be dissolved and wound up, that an account be taken of its dealing and assets, including an enquiry as to the properties purchased

P. O.
1918.
Joopoody
v.
Pulavarti.

out of the funds thereof, that the half share of the Kottapally branch be ascertained and that three shares thereof be made over to the appellants with cost, and for further and other relief.

Against the first defendant the appellants claimed partition of certain family property, but that claim was compromised before trial.

Venkanna and the respondent alleged that thirty years previously an agreement had been come to between the Kottapally branch on the one side and the said Venkanna on the other, whereby each party was to have a half share in the two businesses. They further alleged that in 1890 or thereabouts an arrangement was come to between the two parties, whereby the Kottapally branch were to take as their share of the said two businesses the Kottapally business, and that the said Venkanna was to have his share the Akuvidu business, that since the said Venkanna has been enjoying the property of the latter business separately, that the said Akuvidu partnership ceased at the time aforesaid, and they pleaded that the suit was barred by limitation.

The Subordinate Judge found *inter alia* that the said Venkanna had had no interest in the said Kottapally properties and business, that the Kottapally branch of the family had owned a half share of the Akuvidu business and properties, that there was no settlement or agreement in 1890, as alleged in the written statement, or in 1891 as alleged at the trial, that the Kottapally branch were to take the Kottapally properties, and that the said Venkanna was to take the Akuvidu properties and business, that the appellants continued to possess their interest in the said last mentioned properties and business, and that subsequent to 1891 there had been various attempts made by them to secure a division of the said properties; he held therefore no question of limitation arose in the case and that the plaintiffs were entitled to a share in the said business at Akuvidu. In the result he decreed the suit.

The High Court on appeal held that the partnership must be treated as having been put an end to in 1891, that the plaintiffs were not treated as partners subsequent to that date, and that therefore their claim was barred by limitation. The decree of the lower Court was dismissed with costs.

The appellants thereupon appealed to his Majesty in Council.

A. M. Dunne, for the Appellants: The case was not tried on the question that the conduct of the appellants raised a

presumption that the partnership was dissolved in 1891 because they were excluded from the business and their subsequent conduct was consistent only with dissolution. The question tried was whether there was a dissolution in 1891.

[LORD ATKINSON.—You have to prove that the partnership existed up to within three years prior to the suit.]

It is admitted that there was a partnership and that it continued until 1891. It was a partnership at will and it follows, as a matter of law, from the admissions that it continued up to the time of the suit unless the other side proves that there was a dissolution. The only dissolution alleged is that of 1891 and it is submitted that the evidence fails to establish that allegation. There is evidence to show that the partnership continued after 1891 and there were subsequent demands for accounts and share of profits. The last demand was in 1901, when the respondent refused to account. The period of limitation began to run from 1901, when the cause of action arose. The suit is therefore not barred under Art. 106 of Sch. II of the Limitation Act, 1877.

De Gruyther, K. C. (Brown with him) for the Respondent: The partnership was between the joint family of the appellants on the one hand and Venkanna on the other. Partition in the joint family admittedly took place in 1891, when the partnership in question must necessarily have been dissolved: Indian Contract Act section 253: if there was a partnership after 1891, it must have been a new partnership on new terms with new partners. But no such partnership is alleged. The alleged demands in 1893 and 1895 were for fixed amounts as the appellants' shares. They were liquidated debts and as such became barred in 1901. They do not save the suit brought in 1902 from limitation. There are concurrent findings that the partnership was dissolved in 1891.

(Counsel was stopped).

Dunn, replied.

The judgment of their Lordships was delivered by

Lord Shaw.—This is an appeal against the decree of the High Court of Judicature at Madras, dated the 10th December 1908, which reversed a judgment of the Subordinate Judge of Rajahmundry, dated the 16th September 1905. The suit as brought included a claim for partition of certain family property. That part of the suit has been settled. What remains constitutes the subject of the present appeal. The assertion is that the plaintiffs' family has a half share, along with the defendant (the

P. O.

1918.

Joopoody

Pulavarti.

March, 19.

P. O.
1918.
Joopgody
Pulavarti.
Lord Shaw.

present respondent) in a partnership business carried on in Akuvidu. The High Court has held that this claim is barred by limitation and has dismissed the suit.

It is unnecessary to refer to various other pleas in the case, including those founded on an alleged misjoinder of causes of action, because, in the opinion of their Lordships, the conclusion reached by the High Court on the plea of limitation was clearly correct.

In or about the year 1868 a partnership business was started in Kottapally. At a later date a business was started at Akuvidu. This latter was throughout under the management of one Venkanna, the adoptive father of the respondent. The position of Venkanna (who was the second defendant in the suit) was this: He maintained that in both businesses he had a half share; that in, or shortly before, the year 1891, an arrangement was made under which the joint family represented by the appellants made a partition of their family property; and it cannot be denied that, with regard to the Kottapally business, this partition became an accomplished fact. Venkanna, however, further maintained that there were cross claims; that he was entitled to a certain share of the assets of the Kottapally business; that, on the other hand, the joint family was entitled to a certain share in the Akuvidu business; that these claims were set against each other, and that from 1891 the joint family has had no share in the Akuvidu business.

It has to be admitted that, if a partition has taken place of the joint family property, it is at least not unlikely that that would have extended to all the businesses which the joint family shared; and it must further be conceded that, if the joint family's interests were divided, a dissolution of the Akuvidu partnership with Venkanna was naturally incident to the situation thus created. Different *personae* had arisen in law, and with these it was open to Venkanna to say whether he should be allied in partnership or not. What Venkanna does say, is that the dissolution—thus not unnatural in the situation of the joint family affairs in 1891—did in fact take place. If this is so, the suit, which was initiated 11 years after that event, is, of course, barred by the three years' limitation established by Article 106 of the Limitation Act.

In the opinion of their Lordships, the High Court has come to a correct conclusion, and it is quite unnecessary to enter upon the details of the case, which in the view taken by the Court, amply confirm the result which has been reached.

Four salient points may simply be noted. (1) Prior to 1891, and year after year, detailed accounts, suitable as those of a current partnership business, were rendered as between the joint family, on the one hand, and Venkanna on the other. After that year these accounts entirely ceased. But (2) in the year 1891 an account was furnished of a different character. That account, in their Lordships' opinion, was to all intents and purposes not a revenue but a capital account, showing a complete division of the partnership shares. It was, in short, in form and in substance an account entirely suited to the event and purposes of a dissolution of partnership. (3) From that time forward Venkanna managed the Akuvidu business without any interposition or interference by the joint family or any representative thereof in their interest. It is true that certain requests were made to Venkanna for payment, but these were requests, not for a share of profit, but for the payment of the balance due upon the dissolution account. Finally (4), Venkanna having been apparently throughout maintaining that his liabilities under the Akuvidu business were balanced by his share of the assets in the Kottapally business, the dispute was arranged by a letter of the 3rd May 1901, the authenticity and importance of which is not denied. It was written to Venkanna by the first three plaintiffs and by Lakshmanaswamy, who is called as the first defendant. In fact, it is the letter of the members of the joint family; and in this letter, signed by them, they admit to Venkanna "you are singly carrying on business," and they refer to the "verbal arrangement before this among ourselves that the property acquired by you by carrying on business at Akuvidu, and the property acquired by us by carrying on business at Kottapally, should be duly divided and taken according to shares." They then narrate their unanimous request for a settlement, and agree to take from Venkanna a sum according to his wishes. Serious questions might be raised as to whether the writers of such a letter were not barred from thereafter instituting the present suit, but for the purpose of the point of this decision it is sufficient to say that it completely confirms the idea of a dissolution of partnership, having been effected at a previous date, and it squares with the events on that footing which took place in the year 1891.

Mr. Dunne presented a careful argument, in which he strongly insisted that, as the Akuvidu partnership was one at will, it must be presumed to last till now, unless a definite

P.O.

1913.

Jooipoody

Pulavarti.

Lord Shaw.

P. C.

1918.

Joopody

c.

Pulavarti.

Lord Shero.

date of dissolution could be put forward and made out. But, in their Lordships' opinion, this has been done, and in a substantially conclusive manner. When annual accounts ceased, and a final account, showing the division of both capital and revenue was made out, the presumption was for dissolution as at the definite date of the year in account thus closed. The cessation of the annual accounts points to some radical change having taken place, and the other circumstances above noted leave little doubt upon the mind that that change was the dissolution of the firm as in the year mentioned.

All other questions in the case are thus at an end. Their Lordships will humbly advise His Majesty that the appeal should be dismissed and the judgment of the High Court affirmed. The appellants will pay the costs of this appeal.

Sanderson, Adkin, Lee and Eddis.—Solicitors for the Appellants.

Douglas Grant.—Attorney for the Respondent.

J. M. P.

Appeal dismissed.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice and
Mr. Justice N. Chatterjee.*

PURNO CHANDRA KUNWAR

v.

MAHARAJ DHIRAJ BEJOY CHAND MAHATAB BAHADUR
AND OTHERS.*

*Decree, if void—Minor sued as major—Minor not represented by guardian
ad litem.*

A decree passed against a person who was really a minor but who was described in the suit as if he was of age, was a nullity so far as he was concerned, and in a suit instituted several years after the attainment of majority, for a declaration of the nullity of the decree and proceedings thereunder, no question of limitation would arise.

Rashid-un-nisa v. Muhammad Ismail (1) and *Narsingh v. Jahl* (2) followed.

So long as a guardian *ad litem* is not appointed, a minor cannot be said to be a party to a suit in the proper sense of the term.

* Appeal from Appellate Decree No. 681 of 1908, against the decree of F. B. Boe, Esq., District Judge of Hoogly, dated the 16th December, 1907, reversing that of Babu Ambica Charan Mukherji, Officiating additional Subordinate Judge of Hoogly, dated the 16th July, 1907.

(1) (1909) 10 C. L. J. 818. (2) (1911) 15 C. L. J. 8.

CIVIL

1918

January, 6, 7,
February, 26.

Appeal by the plaintiff.

Suit for a declaration that a rent decree passed in a suit and the proceedings in execution thereof were fraudulent, collusive and inoperative against him and for recovery of the amount realised by the defendant from him by arresting in execution of the said decree.

A suit for rent was brought in respect of a *putni* taluk, in which the plaintiff alleged that he had no interest and in that suit, though a minor, he was represented as of age; that no summons had been served on him and an *ex parte* decree was passed against him. The Court of first instance held that the decree and the execution proceedings were inoperative against the plaintiff and passed a decree for the amount claimed in his favour. On appeal the District Judge reversed that decree and dismissed the suit.

Babus Umakali Mukherji and Amulya Ratna Sur for the Appellant.

Dr. Rask Behary Ghose, Babus Basanta Kumar Bose and Soroski Charan Mitter for the Respondents.

C. A. V.

The judgment of the Court was as follows :

This appeal arises out of a suit for a declaration that a rent decree passed in a suit No. 7 of 1896 of the Court of the Subordinate Judge of Hooghly, and the proceedings in execution thereof were fraudulent, collusive and inoperative against him, and for recovery of Rs. 2,076-7-6 which the defendant had realized from him, by arresting him in execution of the said decree.

The plaintiff alleged that the *putni* taluk in respect of which the rent decree was passed, belonged exclusively to one Lakhi Narain, and he, the plaintiff had no interest therein, that he was a minor at the time the said decree was passed, but was described in the suit as if he was of age, that no summons had been served upon him and an *ex parte* decree was passed against him, that the said Lakhi Narain put in Vakalat-namas and applications in the execution proceedings purporting to have been signed by him, that in execution of the decree, after the *putni* taluk had been sold and some portion of the decretal amount had been realized, the plaintiff was arrested and Rs. 2,076-7-6 was realized from him.

The Court of first instance held that the decree and the execution proceedings were inoperative against the plaintiff and passed a decree for the amount claimed, in his favour. On

CIVIL

1918:

Purno Ohandra

Bejoy Ohand.

February, 28.

CIVIL.

1918.

Purno Chandra

v.
Bejoy Chand.

appeal the District Judge reversed that decree and dismissed the suit. The plaintiff has appealed to this Court. As there was no definite finding by the lower Appellate Court, upon the question of the minority of the plaintiff, the case was remanded for a finding whether the plaintiff was a minor at the date of the institution of the said suit No. 7 of 1896 and at the date of the decree passed in that suit. The District Judge has returned his finding that the plaintiff was a minor.

The present suit was instituted on the 21st December 1905, and the plaintiff attained his majority several years before the suit. If however the decree is a nullity as against him, no question of limitation would arise. The question therefore is whether a decree passed against a person who is really a minor but who is described in a suit as if he was of age, can be treated as a nullity as against such person, or is one which it is necessary to set aside, in other words, whether it is merely voidable.

There can be no doubt that a decree passed against a person who is neither a party nor is properly represented on the record is a nullity and might be disregarded without any proceeding to set it aside. If any authority is needed for this proposition we may refer to the case of *Khierajmal v. Daim* (1). In the present case, the plaintiff is found to have been a minor when the suit for rent was brought and the decree was passed. Having been sued as if he was of age, no guardian *ad litem* was appointed for him. His name appeared as a defendant on the record, but was he a party in the eye of law? So long as a guardian *ad litem* is not appointed a minor cannot take any steps in the suit and cannot be said to be a party to a suit in the proper sense of the term. The ruling of the Judicial Committee in the case of *Rashid-un-nisa v. Muhammad Ismail Khan* (2) is conclusive upon this point. There a decree had been obtained on an award made by arbitrators, and in the award the elder sister of the minor appellant in that case was described as acting for herself and as guardian of the minor. As a matter of fact an application by the elder sister was pending at the date of the award before the District Judge for a certificate of guardianship of the minor, which was ultimately rejected. The Privy Council held that the appellant was entitled to a declaration that the award was a nullity so far as she was concerned. There were several other decrees against the minor in which she was described as under the guardianship of her elder sister and at

(1) (1904) I. L. R. 82 Calo. 296.

(2) (1909) 13 C. W. N. 1182; I. L. R. 81 All. 572; 10 C. L. J. 818.

least in one of the suits the sister was appointed guardian *ad litem* of the minor by the Courts. But the sister being a married woman could not be appointed guardian *ad litem* and the Court of first instance held that the minor not having been properly represented, the decrees and sales were not binding on the minor. The decision of the Subordinate Judge was reversed by the High Court, on the ground, that the decrees upon which the execution proceedings were founded were not and could not be in any way impeached, and that the transactions impeached being proceedings in execution could only have been objected to under the provisions of section 244 of the Civil Procedure Code. The Privy Council pointed out that section 244 applied to questions arising between the parties to the suit in which the decree is passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code and their Lordships held that the minor was never a party to any of the suits in the proper sense of the term and restored the decree of the Subordinate Judge.

In the case of *Narsingh Narain v. Sheikh Fahi Mistry* (1), where the mother of an infant defendant, a married woman, was appointed guardian *ad litem* without her consent, it was held following the above case that the infant must be taken not to have been represented for the purpose of the suit and that in such a case, he is in the same position as if he was not made a party to the suit at all, and referring to the case of *Khia Raj-mal v. Daim* (2), the learned Judges said that it was clear from the decision of the Judicial Committee in that case, that the contravention of the statute is not merely an irregularity but renders the proceedings a nullity so far as the infant is concerned.

These decisions are binding upon us, and we must accordingly hold that the plaintiff was no party to the rent suit in the proper sense of the term and is entitled to treat the decree as a nullity so far as he is concerned.

It may be said that in the cases cited above the minority of the defendant was known to the plaintiff and to the Court, but so far as the questions whether a minor without a proper guardian *ad litem* being appointed for him is a party to the suit, and whether a decree in such a suit is a nullity are concerned, there is no difference in principle between a case where the minority is known and a case where the plaintiff and the Court

CIVIL.

1918.

Purno Chandra

v.

Bejoy Chand.

(1) (1911) 15 O. L. J. 8.

(2) (1904) I. L. R. 33 Calo. 286.

CIVIL.

1918.

Purno Chandra

Bejoy Chand.

are not aware of the minority of the defendant. Besides the knowledge or ignorance of the plaintiff cannot affect the rights of an infant.

The case of *Walian v. Bante Behari Pershad Singh* (1), is distinguishable. There the suit was instituted against the minors as represented by their mother as their guardian with the sanction of the Court. The mother appeared throughout the proceedings as guardian of the minors. The Privy Council held that the minors were effectively represented in the suit by their mother and with the sanction of the Court, that the only defect was that no formal order appointing her as guardian was drawn up; but that it was not shown that the alleged defect caused any prejudice to the minors and their Lordships accordingly were of opinion that the defect of procedure was cured by the provisions of section 578 of the Civil Procedure Code.

The decree being a nullity so far as the plaintiff is concerned, the suit cannot be held to be barred by limitation. But if he was liable with the other defendants for the rent of the *putni* for which the decree was obtained, we do not think he should be allowed to recover the amount realized from him under the decree. The Court of first instance found upon the evidence that plaintiff had no interest in the *putni*. The learned District Judge while holding that on the evidence "it would be exceedingly doubtful that the plaintiff had supported any part of the burden which is on him to show that the *taluk* was Lakhi's private property" does not come to a definite finding on the point. The case should therefore go back to the lower appellate Court, in order that, that Court may decide whether the plaintiff had any interest in the *putni* during the period for which the rent decree was obtained so that he was liable for the *putni* rent along with the other defendants in the rent suit. The decree of the lower appellate Court is accordingly set aside, and the case is remanded to that Court for disposal according to law after coming to a finding upon the point stated above. Costs to abide the result.

A. T. M.

Appeal allowed: case remanded.

(1) (1908) I. L. B. 80 Calo. 1031. (P. C.)

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

RADHA MADHAB NARAIN HIKIM

v.

MILAN MAHATO AND OTHERS.*

CIVIL.

1912.

May, 7, 8.

Hikimali tenure—Lease—Invalid grant—Rent, acceptance of—Occupancy right, acquisition of, under trespasser—Bengal Rent Recovery Act (X of 1859)—Grant, nature of—Adverse possession.

A *hikimali* tenure is dependent on the life of the *zamindar* and not on that of the tenure-holder himself.

If there has been an invalid grant, the acceptance of rent from the grantee does not necessarily operate as a recognition or affirmance of the authority and validity of the grant.

Chaitan Singh v. Sadhari Monim (1) followed.

Under Act X of 1859, a right of occupancy can be acquired under a trespasser, and such right can also be acquired when the grantee was let into occupation by a temporary intermediate holder.

In order to determine the true nature of a grant, the terms whereof are ambiguous, reference to the subsequent conduct of the parties may be necessary.

Adverse possession will not be of any avail to a *mokraridar* against a *zamindar*, unless it is brought to the knowledge of the *zamindar* against whom the adverse title is sought to be acquired.

Appeal by the Defendant.

Suit for declaration of title as permanent tenants and for recovery of possession.

A was a Raja from 1861 to 1874 and his younger brother B, the grantee of the lease, dated the 31st March, 1862, was the *hikim*. Upon the death of A in 1874, he was succeeded by C, who was Raja from 1874 to 1892. D, the brother of C, became the *hikim* during that period. During the incumbency of C, the estate got heavily involved in debts and the provisions of the Chota Nagpur Encumbered Estates Act were brought into requisition. On the death of C, there was a dispute as to the succession and the manager under the Encumbered Estates Act took possession of the *hikimali* properties and continued in occupation down to 1896, exercising all the powers of a manager under the statute in relation thereto. During the two following years, B forcibly took possession of the disputed property and collected rent from the tenants. The dispute as to succession

* Appeal from Appellate Decree No. 174 of 1911, against the decree of Babu Advaita Prasad De, Subordinate Judge of Manbhum, dated the 5th December, 1910, reversing that of Babu Khagendra Nath Bosu, Munsif of Purulia, dated the 30th January, 1908.

(1) (1905) 5 O. L. J. 63.

CIVIL.

1912.

Badha Madhab

v.
Milan Mahato.

was settled in 1899 when E took possession of the estate as Raja, while F, his younger brother, took possession of the *hikimali* properties as *hikim*. No rent was accepted from B by F himself and about the year 1905, B was dispossessed.

The first Court dismissed the suit, but the decree was reversed on appeal.

Babus Joges Chandra Roy and Lalit Mohon Ghose for the Appellant.

Babu Dwarka Nath Mitra for the Respondents. C. A. V.

The judgment of the Court was delivered by

May, 8.

Mookerjee J.—This is an appeal on behalf of the defendant in an action commenced by the plaintiffs respondents for declaration of their title as permanent tenants in respect of the disputed land and for recovery of possession thereof. The case for the plaintiffs is that on the 31st March 1862, a permanent lease was granted to their predecessor by one Mahendra Narain and that they were in possession by virtue of that lease till 1905 when they were unlawfully evicted by the defendant. The Court of first instance dismissed the suit on the ground that the permanent lease set up by the plaintiffs as the foundation of their title was not binding upon the defendant. Upon appeal, the Subordinate Judge has taken the same view in so far as the efficacy of the lease is concerned; but he has held that as the grant was made for the purpose of reclamation, the plaintiffs are entitled to succeed. On behalf of the appellant, this decision has been assailed as self-contradictory, and it has been argued that as the plaintiffs have failed to establish their alleged permanent tenancy, they are not entitled to relief on any other ground as against the defendant.

To test the soundness of this argument, it is necessary to explain the position of the family one member whereof made the grant of 1862. It appears that in this family the eldest son of the owner succeeds to the property as the Raja, while the second son is entitled to the particular property now in dispute as *hikim*. Makund Narain was the Raja from 1861 to 1874 and his younger brother Mahendra Narain, the grantor of this lease, was the *hikim*. Upon the death of Makund Narain in 1874, he was succeeded by Kishori Prosad who was Raja from 1874 to 1892. The brother of Kishori Prosad, Ganga Narain, became the *hikim* during this period. During the incumbency of Kishori Prosad, the estate got heavily involved in debts, and the provisions of the Chota Nagpur Encumbered Estates Act were brought

CIVIL.

1912.

Radha Madhab

Milan Mahato.

Mookerjee, J.

into requisition. This was the condition of things during the lifetime of Kishori Prosad ; and even after his death, the estate continued in the hands of the manager under the Encumbered Estates Act. It further appears that at this stage there was a dispute as to the succession ; and while the controversy went on, it was necessarily uncertain who would be entitled to take the Raj and who would succeed as the *hikim* ; the manager under the Encumbered Estates Act, took possession of the *hikimali* properties as well, and continued in occupation down to the year 1896, exercising all the powers of a manager under the statute in relation thereto. During the two following years, Mahendra Narain, who had ceased to be *hikim* upon the death of his brother in 1874, forcibly took possession of the disputed property and collected rent from the tenants. Meanwhile, the dispute as to succession had been settled, and in 1899 Radha Gobind took possession of the estate as Raja, while his younger brother Radhamadhab took possession of the *hikimali* properties as *hikim*. There is no evidence to show that any rent was accepted from the plaintiffs by Radhamadhab himself, and, as already stated, about the year 1905 the plaintiffs lost possession. Their grievance is that at the time when they were evicted, they had a subsisting right under the grant of 1862, and they now seek to recover possession on the strength of that title. The Courts below have held concurrently that a grant made by a *hikim* continues in operation neither for the life of the grantor nor for the life of the grantee, but during the life of the Raja. The reason for this rule becomes obvious when we consider the nature of the *hikimali* tenure. It is explained by Sir William Hunter in his Statistical Accounts of Bengal (Vol. XVII. 336) that *hikimali* is a term applied to grants of land assigned for the maintenance of the *hikim* or second brother and the *kumar* or third brother of the zemindar for the time being. On the death of the zemindar, the brother of his successor takes up the land attached to the office of *hikim* or *kumar* and performs the services in consideration whereof these lands are held. A *hikimali* tenure is thus dependent on the life of the zemindar and not on that of the tenure-holder himself. It is fairly clear, therefore, that the grant of the 31st March 1862 could not, under ordinary circumstances, continue in operation after the death of Mukund Narain when the grantor himself would cease to be *hikim*. Consequently, during the incumbency of Ganga Narain as *hikim* from 1874 to 1892, it was open to him to repudiate the

CIVIL.

1912.

Radha Madhab

v.

Milan Mahato.

Mookerjee, J.

grant and to eject the grantee as trespasser. Ganga Narain, however, accepted the grantee as his tenant and continued to recognise him as such and to realise rent from him in that character. Upon the death of Kishori Prosad, when Ganga Narain ceased to be *hikim*, the property came into the possession of the manager under the Encumbered Estates Act. It may be a matter for controversy whether the manager was entitled under the law to take possession of the *hikimali* tenure. If the true theory be that upon the death of the Raja, the *hikimali* tenure reverts to the Raj and is regranted to the new *hikim*, the position may be defensible that upon the death of Kishori Prosad, while the dispute as to the succession continued, the manager was rightfully in possession of the entire property of the Raj inclusive of the *hikimali* tenure. On the other hand, if the true theory be that upon the disappearance of the *hikim*, the *hikimali* property passes directly to the successor as *hikim*, it may well be doubted whether the manager under the Encumbered Estates Act was competent to take possession of the *hikimali* property. The fact, however, remains that upon the death of Kishori Prosad the manager obtained possession and, if he was not the *de jure* holder, he was undoubtedly the *de facto* holder of the property. The propriety of his possession has not up to the present moment been challenged by the defendant, and we may accordingly proceed on the assumption that such possession was lawful. The question, therefore, arises, what is the precise effect of the acceptance of rent, by the manager under the Encumbered Estates Act, from the plaintiffs during the years 1893 to 1906. On behalf of the plaintiffs it has been contended that such acceptance of rent was equivalent to a recognition of the validity and binding character of the grant of 1862. On behalf of the appellant it has been argued, on the other hand, that in view of the decision of the Judicial Committee in *Beni Pershad Koeri v. Dudhnath Roy* (1) the grant became void upon the death of Kishori Prosad, if not upon the death of Mukund Narain, and that the acceptance of rent by the manager could at best operate as recognition of some right in the plaintiffs not necessarily identical with that created in 1862. In our opinion, the materials on the record do not justify the conclusion that the acceptance of rent from the plaintiffs by the manager involved, by implication, a recognition of the continuance of the grant of 1862. The

(1)-(1899) L. R. 26 I. A. 220, I. L. R. 27 Calc. 156, 4 O. W. No 274.

CIVIL.

1912.

Radha Madhab

v.
Milan Mahato.

Mookerjee J.

view we take is supported by the decision of this Court in *Chaitan Singh v. Sadhar Monim* (1) where it was pointed out, on the authority of the decision of the House of Lords in *President and Governor of the Magdalen Hospital v. Knotts* (2), that if there has been an invalid grant, the acceptance of rent from the grantee does not necessarily operate as a recognition or affirmation of the authority and validity of the grant. In this view, the conclusion follows that the plaintiffs, when evicted by the defendant in 1896, were still tenants in occupation and could not be ejected unless after their tenancy had been lawfully terminated, even if it be assumed that the tenancy was of a terminable character. With reference to this question, it has been argued by the respondents that the tenancy was not of a terminable character because the grant of 1862 was on the face of it for agricultural purposes and that the tenants had acquired a right of occupancy in accordance with the provisions of Act X of 1859. Now, it may be conceded that under that statute, a right of occupancy could be acquired under a trespasser, as recognised in the cases of *Syud Ameer Hossein v. Sheo Suhae* (3) and *Zulfun Beebee v. Radhica Chunder* (4) and such right could also be acquired when the grantee was let into occupation by a temporary intermediate holder as laid down in the case of *Golam Panja v. Hurish Chunder Ghose* (5). But, even if we accept in substance the view put forward on behalf of the respondent, which is in essence the view adopted by the Subordinate Judge, the position remains that the question of the nature of the grant of 1862 has never been directly put in issue, and we are thus unable to pronounce a final and definite opinion upon the question whether the grantee of 1862 was a raiyat or an intermediate tenure-holder. No right of occupancy could plainly be claimed unless the grant was to a raiyat. The respondent has accordingly suggested that the question of the true nature of the grant may be determined, as laid down in the case of *Durga Prosunno Ghose v. Kalidas Dut* (6), upon a construction of the lease. But, as has been explained in the cases of *Ramdayal Giri v. Midnapur Zemindary Co. Ltd.* (7) and *Pr-motho Nath Kumar v. Nilmani Kumar* (8), in order to determine the true nature of a grant, the terms whereof are ambiguous, reference to the subsequent conduct of the parties may be

(1) (1903) 5 O. L. J. 62.

(2) (1879) 4 App. Cases 824.

(3) (1871) 19 W. R. 383.

(4) (1878) 1 O. L. R. 858.

(5) (1872) 17 W. R. 552.

(6) (1881) 9 O. L. R. 449.

(7) (1910) 15 O. W. N. 233.

(8) (1911) 15 O. W. N. 902.

CIVIL,
1913.

Radha Madhab
v.
Millan Mahato.
Mookerjee, J.

necessary. The case, as we have stated, has not been considered from this point of view, and we are therefore not in a position to support the conclusion of the Subordinate Judge that although *prima facie* the grant of 1862 would lapse upon the death of Raja Mukund Narain, yet the grantee or his successor in interest is entitled to the privileges of an occupancy raiyat. The respondent has further contended that he has acquired a good title to the property as grantee by reason of adverse possession. His argument in substance is that since 1892 he has asserted title as grantee under the lease of 1862 and that in fact a similar assertion has been made since 1874 during the incumbency of Ganga Narain as *hikim*. Here, again, the facts found are not sufficient to enable us to hold that the plaintiffs respondents have acquired, by adverse assertion of title, the position of a permanent grantee. As has been laid by the Judicial Committee in the cases of *Rajah Sahab Perhlad v. Doorga Pershad* (1) and *Tekastnee Goura v. Saroo* (2), such adverse possession would not be of any avail unless it was brought to the knowledge of the person against whom the adverse title was sought to be acquired. The case has not been considered from this point of view, and it is therefore impossible for us to affirm the validity of the contention of the respondent in this respect.

The result is that although we hold that, at the time when the plaintiffs were evicted, they had tenancy right of some description, we are not in a position to pronounce any definite opinion as to the true status of the plaintiffs. Consequently this appeal must be allowed in part and the decree of the Subordinate Judge varied. The plaintiffs will be entitled to recover possession as tenants under the defendants; but the question of their precise status will be left open for consideration in a future litigation, if the occasion should arise. Under the circumstance of the case, we direct that each party should pay his own costs throughout the litigation.

A. T. M.

Appeal allowed in part.

(1) (1869) 12 W. R. P. O. 6 (14);
12 M. I. A. 286 (828).

(2) (1878) 19 W. R. 252.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.*

SAILAJA PROSAD CHATTERJEE

v.

GYANI DAS.*

CIVIL,

1912.

April, 29, 30.

*Rent decree, execution of—Purchase by decree-holder in execution of money
decree subject to rent charge, effect of.*

A landlord, who purchases the defaulting tenure in execution of his money decree subject to rent charge, cannot execute his decree for rent as the judgment-debt in his favour for rent is extinguished.

A decree-holder who has obtained a decree for rent is free to proceed against any property of the judgment-debtor; he is under no obligation to proceed in the first instance against the defaulting tenure.

Appeal by the decree-holder.

Application for execution of rent Decree.

The decree-holder appellant obtained a rent decree in 1904 against the respondent. In 1906, the appellant obtained a decree for money against the respondent. In execution of that decree, he attached the tenure in respect of which the rent decree now sought to be executed had been previously obtained. At the instance of the decree-holder, it was proclaimed at the time of sale that the tenure in question was subject to a judgment-debt under the decree of 1904. At the sale which followed, the decree-holder purchased the property. He then sought to execute the rent decree against the properties of the judgment-debtor other than the defaulting tenure which he himself purchased. The Court below rejected the application.

Babus Dwarka Nath Chuckerbuty, Khettar Mohan Sen and Bankim Chandra Mukerjee for the Appellant.

Babu Surendra Nath Ghosal for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal on behalf of the decree-holders against an order whereby their application for execution of a rent decree obtained by them in 1904 against the respondent has been dismissed. It appears that in 1906 the appellants obtained a decree for money against the respondent. In execution of that decree, they attached the tenure in respect of which the rent decree now sought to be executed had been previously obtained. At the instance of the decree-holders, it was proclaimed at the time of sale that the tenure in question

April, 30.

* Appeal from Order No. 229 of 1909, against an order of Babu Jogendra Nath Mitter, Subordinate Judge of Monghyr, dated the 27th February, 1909.

CIVIL.

1912.

Sailaja Prasad

v.
Gyanf Das.

Mookerjee, J.

was subject to a judgment-debt under the decree of 1904. At the sale which followed, the decree-holders purchased the property. They now seek to execute the decrees against the properties of the judgment-debtor other than the defaulting tenure which they themselves have purchased. The Subordinate Judge has held that the effect of the purchase by the decree-holders in 1906 was to extinguish the decree which they now seek to execute. On behalf of the appellants it has been contended that this view is erroneous, because the rent decree, as appears on the face of the record, has not yet been satisfied and is consequently capable of execution against the judgment-debtor named therein. It may be conceded, as was pointed out by this Court in the cases of *Fotick Chunder Dey v. Foley* (1) and *Srimandra Mohan Tagore v. Surnomoyi* (2), that a decree-holder who has obtained a decree for rent is free to proceed against any property of the judgment-debtor; he is under no obligation to proceed in the first instance against the defaulting tenure. This principle, however, is of no assistance to the decree-holders. The real question in the present case is, whether the effect of the purchase by the appellants has been to extinguish their rights under the rent decree. When they took out execution of the money decree against the tenure, they were bound to notify that they held a decree for rent enforceable against it; if they had not notified the rent charge, they could not have subsequently pursued the property, in the hands of a *bona fide* purchaser, for the satisfaction of their dues. [*Doolhub Sircar v. Kristo Coomar* (3), *Munnoo Lall v. Lalla Choones Lall* (4), *Dooles Chund v. Oomda Begum* (5), *Nursing v. Roghoobur* (6) and *Giribala v. Mina Kumari* (7)]. It was thus, at their instance, that the proclamation was very properly made that the tenure would be sold subject to the judgment-debt under the decree of 1904. Whoever, therefore, purchased at the sale, would take the property subject to the liability notified, and it makes no difference that the decree-holders themselves are the purchasers; the judgment-debt in their favour must consequently be deemed to have been extinguished. The position might possibly have been different, had the property been purchased by a stranger. In that event, if the decree-holders had proceeded to execute the decree for rent against other properties of the judgment-debtor, the

(1) (1887) I. L. B. 15 Calo. 492.

(2) (1898) I. L. B. 26 Calo. 108.

(5) (1875) 24 W. R. 268.

(3) (1869) 12 W. R. 808.

(6) (1884) I. L. B. 10 Calo. 639.

(4) (1878) 21 W. R. 21 P. O.

(7) (1900) 5 O. W. N. 497.

judgment-debtor might have been able to realise the sum from the execution-purchaser, upon the property in whose hands lay the responsibility primarily to satisfy the decree. In the case before us, however, the decree-holders themselves are the execution-purchasers, and, they cannot be permitted any longer to execute the decree.

The result is that the order of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at three gold mohurs.

A. T. M.

Appeal dismissed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Holmwood.*

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

RASHIDUL HUQ AND OTHERS.*

Possession, suit for—Regulation III of 1828, Sec. 4—Collector, what decides—Grant for maintenance—'Ba farzand'—'Ba walad'—Regulation XXXVII of 1793, Sec. 15—Regulation XIV of 1825, Sec. 3.

The only question within the competence of the Collector to decide under section 4 of Regulation III of 1828 is, whether the land is or is not liable to be assessed with revenue.

Grants for maintenance are, *prima facie*, resumable upon the death of the grantee. But this is not an inflexible rule of law.

Where a grant has been made whereby property is vested in the grantee and his descendants by appropriate terms sufficient to create an hereditary estate, that hereditary estate is not out down and made inalienable merely by a direction that certain persons were to be maintained.

The term *ba farzand*, which is equivalent to the expression *mai farzand*, means 'with offspring,' 'with children'; it is a term inserted in a grant which is made to the grantee and his posterity: it is in fact equivalent to the expression *ba walad*, and the expression applies to heirs and descendants generally, although according to the derivative meaning it denotes only the children of the grantee or his heirs in direct line of descent.

In so far as a *maddamash* grant is made hereditary by section 15 of Regulation XXXVII of 1793, it is in no way affected by clause (8) of section 8 of Regulation XIV of 1825. This latter provision simply lays down that the burden lies upon the person, who asserts a claim of this description against the State, to establish that the claim is well-founded.

Appeal by the Plaintiff.

Suit for recovery of possession of 101 bighas of *lakheraj* land.

The material facts and arguments are sufficiently stated in the judgment.

* Appeal from Original Decree, No. 270 of 1910, against the decree of Babu Hem Chandra Mookerjee, Subordinate Judge of Monghyr, dated the 11th March, 1910.

CIVIL.

1912.

Sallaja Prasad

Gyani Das,

Mookerjee, J.

CIVIL.

1912.

July, 25.

CIVIL

1912.

Secretary of State
for India in Council.

Rashidul Haq.

Babus Ram Charan Mitra and *Sris Chandra Chowdhry* for
the Appellant.

Babus Joges Chandra Dey, *Chandra Sekhar Prosad Singh*,
Khetra Mohan Sen, *Soroshi Charan Mitter* and *Harihar Prosad*
Singh and *Moulvi Muhammad Mustafa Khan* (for *Moulvi Syed*
Mahomed Tahir) for the Respondents.

The judgment of the Court was delivered by

July, 25.

Mookerjee J.—This is an appeal on behalf of the Secretary of State for India in Council against the decree of dismissal in a suit for recovery of possession of 101 bighas of *lakheraj* land. The land in dispute was granted to the predecessor of the defendants, on the 5th January 1764 by Emperor Shah Alam of Delhi. The original grant was destroyed by fire in the beginning of the last century; but a copy was obtained at the time and has been produced in this litigation. The Subordinate Judge has held upon a construction of this grant that the grantee took a permanent heritable interest thereunder and that the land is not resumable by the State. This decision has been challenged before us substantially on two grounds; namely, *first*, that the decision of the revenue authorities in resumption proceedings which were heard by the Collector on the 16th March 1838 operates as *res judicata*, and, *secondly*, that upon a true construction of the grant, the grantee did not obtain a perpetual interest in the land.

In support of the first contention, reference has been made to the first clause of section 4 of Regulation III of 1828. That Regulation was passed to provide for the appointment of Special Commissioners for the speedy hearing and determination of appeals from the decision of the revenue authorities in regard to land occupied or rent collected by individuals without payment of the revenue demandable by government under the general law of the country. The first clause of section 4 provides that on the establishment of the Commissioner the Collector may institute enquiries under Regulation II of 1818 and Regulation IX of 1822 without the previous sanction of the Board of Revenue. It further provides that in such a proceeding the Collector should record his judgment as to the liability of the land to assessment, and such decision would then have the force and effect of a decree. It will be observed that the only question within the competence of the Collector to decide under section 4 of Regulation III of 1828 is, whether the land is or is not liable to be assessed with revenue. In the proceedings which were

commenced for the resumption of the disputed land in 1837, the Collector decided that the land was not resumable. He held in substance, *first*, that the daughter of the original grantee was entitled to continue in occupation of the land without payment of revenue to the State, and *secondly*, that the children of the daughter were similarly entitled to retain the land without payment of any dues to the State. In view of these findings, the application for resumption was refused. When the matter was carried before the Commissioner, an interlocutory opinion appears to have been recorded to the effect that the Collector had decided that the land was resumable upon the death of the children of the daughter of the original grantee. This interpretation, in our opinion, was manifestly erroneous, and what order was finally passed by the Commissioner is not known. But even if it be assumed that the Collector had in effect found that the land was so resumable at a future date, the decision was clearly without jurisdiction. The matter directly and substantially in issue before the Collector was whether the land was resumable when the application for resumption was made against the daughter of the deceased grantee. That question, as we have seen, was decided in favour of the representative of the grantee. To that extent, the decision may be taken to be operative and conclusive between the parties; but this view is of no real assistance to the present appellant. The first ground therefore fails.

CIVIL.

1912.

Secretary of State for
India in Council

Rashidul Haq.

Mookerjee, J.

In support of the second contention, it has been urged that the grant was for maintenance of the grantee and was consequently resumable upon the death of the grantee. In support of this proposition reliance has been placed upon the case of *Ramashar Bakhsh v. Arjun Singh* (1). It may be assumed that grants for maintenance are, *prima facie*, resumable upon the death of the grantee: *Woodoyaditto v. Mukoond* (2). But this is by no means an inflexible rule of law. As was pointed out by the Judicial Committee in the case of *Raja Nursingh Deb v. Roy Koylas Nath and others* (3) which was explained by their Lordships in *Gulabdas Jugjivandas v. Collector of Surat* (4), where a grant has been made whereby property is vested in the grantee and his descendants by appropriate terms sufficient to create an hereditary estate, that hereditary estate is not cut down and made inalienable merely by a direction that certain persons were to be maintained. See also *Ramchandra v. Jogendra Nath* (5),

(1) (1900) L. R. 28 I. A. 1; I. L. B. 28 All. 194. (2) (1862) 9 M. I. A. 55.

(3) (1874) 22 W. B. 225.

(4) (1878) I. L. B. 8 Bom 186.

(5) (1905) 4 C. L. J. 899.

CIVIL

1912.

Secretary of State for
India in Council

Rashidul Huq.

Mookerjee, J.

Rameshar v. Gobardhan (1) and *Yagannadha v. Pedda Pakir* (2).

The question, therefore, is, what is the true meaning of the grant made by the Emperor on the 5th June 1764. That grant states explicitly that 101 bighas of land fit for cultivation and held under previous *sanad* stand as *madadmash* in the name of the dependents of the learned Mufti Imamuddin Hossain. The grant then proceeds to add that regard being had to the rights of the aforesaid person, the grant is allowed to stand as before as well as to children and dependents (*mai furzandan wa wabistagan*) from the beginning of 1764. The grant concludes with the direction to the officers of the State that the dependents and the children of the *mufti* are not to be disturbed in the enjoyment of the properties conveyed, the dues ordinarily payable to the State are to be considered as remitted, and they are not to demand a fresh *sanad* every year. It is obvious that this was a heritable grant in perpetuity, and in support of this proposition reference may be made to the decision of their Lordships of the Judicial Committee in the case of *Tulshi Pershad Singh v. Ram Narain Singh* (3). As pointed out by Wilson in his Glossary, the term *bafursund*, which is equivalent to the expression *maifarsund*, means "with offspring", "with children"; it is a term inserted in a grant which is made to the grantee and his posterity; it is in fact equivalent to the expression *ba walad*, and it has always been held that this expression applies to heirs and descendants generally, although according to the derivative meaning it denotes only the children of the grantee or his heirs in direct line of descent.

It is worthy of note that the interpretation we put upon the grant is fortified by three important circumstances. In the first place, though the copy of the grant, as we now possess it, is in a torn condition, and the word which precedes the expression "*mai furzandan wa wabistagan*" cannot be read, yet the word is reproduced in the written statement of the daughter of the grantee in the resumption proceedings of 1837. That word, as the Subordinate Judge has stated, was *daimi* which means permanent. There can be no doubt, therefore, that as the word *daimi* was in the original, the grant was made expressly in perpetuity. In the second place, the grant recites that at the time of its confirmation in 1764, the land stood as *madadmash* in the records of the State. Now, section 15 of the Regulation XXXVII of 1793 shows that a grant of this description is here-

(1) 1907, 7 O. L. J. 202.

(2) (1881) I. L. R. 4 Mad. 871.

(3) (1885) L. R. 12 I. A. 205; L. L. R. 12 Cal. 117.

ditary. The learned Government pleader has contended, however, that the effect of section 15 of Regulation XXXVII of 1793 was weakened, if not completely abrogated, by the provisions of clause 3 of section 3 of Regulation XIV of 1825. We are of opinion that there is no force in this contention. In so far as a *madadmash* grant is made hereditary by section 15 of Regulation XXXVII of 1793, it is in no way affected by clause 3 of section 3 of Regulation XIV of 1825. This latter provision simply lays down that the burden lies upon the person, who asserts a claim of this description against the State, to establish that his claim is well-founded. But even if the burden be thrown entirely upon the defendants in this case, they have completely established the permanent grant they allege by the deed of the 5th January 1764. In the third place, the construction we put upon the grant is borne out by what has been hitherto accepted as the correct view by the officers of the State. If the contention of the appellant is well-founded, there was a personal grant to the Mufti Imamuddin by name and also to his children. In this view, upon the death of the daughter of the grantee, the State was entitled to resume the land; but as a matter of fact, in accordance with the view of the revenue authorities expressed in 1838, the descendants of the daughter have been allowed to continue undisturbed in possession without payment of revenue to the State for more than a quarter of a century. In view of these facts, there is no room for controversy that a perpetual grant was made in 1764 in favour of the predecessor of the defendants.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Holmwood.*

SURJA NARAIN JHA

v.

BUNWARI JHA AND OTHERS.*

Appeal—Award—Time for objecting, if can be extended—Limitation Act (XV of 1877), Sec. 5, Sch. II, Art. 158—Civil Procedure Code (Act XIV of 1882), Sec. 523—'If an application has been made to set aside the award'—Omission.

No appeal lies from a decree based on an award, though the award was annulled on the ground that there was no award valid in law.

* Appeal from Original Decree No. 20 of 1910, against the decree of A. MacGavin, Esq., Subordinate Judge of Deoghur, dated the 28th July, 1909.

CIVIL

1912

Secretary of State for
India in Council

Basahidul Huq.

Mookerjee, J.

CIVIL

1912.

July 30.

CIVIL.

1912.

Surja Narain
v.
Bunwari Jha.

Raja Har Narain v. Chandra Bhagwati (1) explained.

It is not competent to the Court under section 5 of the Limitation Act, to extend the period of ten days prescribed by Art. 158, Sch. II of the said Act, for filing objections to an award.

The expression, "if no application has been made to set aside the award" in section 522 of the Code of Civil Procedure, refers to a contingency other than remission of the award.

If a reference was made with the consent of the person having no authority to act on behalf of the guardian of an infant party, the guardian *ad litem* could set aside the award within the time prescribed by Art. 158, Sch. II of the Limitation Act.

Appeal by the Plaintiff.

A suit was referred to arbitration and an award made, which was filed on the 8th July, 1909. The Court thereupon adjourned the case till the 18th July and directed the parties to file objections, if any, on or before that date. On the 17th July, it was discovered that the date to which the case had been adjourned, was a Sunday; the Court thereupon adjourned the case to the 28th July. As the objection was not filed within the 18th July, a decree was made in terms of the award.

Babus Dwarka Nath Chakrabarti and *Rames Chandra Sen* for the Appellant.

Babus Mohendra Nath Roy, Ambikapada Chowdhry and *Peary Mohan Chatterjee* for the Respondent.

The judgment of the Court was delivered by

July, 30

Mookerjee J.—This appeal is directed against a decree made under section 522 of the Code of Civil Procedure of 1882, in confirmation of an award of arbitrators. A preliminary objection has been taken to the competency of the appeal, because, under that section, an appeal does not lie from such decree except in so far as the decree is in excess of or not in accordance with the award. As the decree is not assailed on behalf of the appellants on the ground that it is in excess of or not in accordance with the award, the appeal is *prima facie* incompetent.

It has been argued, however, on behalf of the appellant, upon the authority of the decisions in *Indur Subbarami Reddy v. Kandadi Rajamannar Ayyangar* (2) and *Muhammad Abid v. Muhammad Asghar* (3), that inasmuch as the award is assailed on the ground that there was no award valid in law, the appeal is competent. But this contention cannot possibly prevail, in view of the plain language of section 522, and of the exposition of the law by the Judicial Committee in *Ghulam Khan v.*

(1) (1891) I. L. B. 18 All. 800.

(2) (1902) I. L. B. 23 Mad. 47.

(3) (1885) I. L. B. 8 All. 64.

Muhammad Hassan (1). Our attention, however, has been invited to another decision of the Judicial Committee in *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar* (2) where an appeal, under somewhat similar circumstances, was allowed to be heard without any question as to its competency. In that case, the award had been filed after the expiry of the time prescribed by the Court, and it was held by the Judicial Committee that there was no legal award which could be made the foundation of a decree. It is clear, however, from the judgment of the Judicial Committee that no question as to the competency of the appeal was raised either before their Lordships or in the High Court. Consequently, that decision cannot be treated as in any way in conflict with the later decision of the Judicial Committee in the case of *Ghulam Khan v. Muhammad Hassan* (1).

It is further worthy of note that even if the appellant were allowed to invite this Court to interfere in the exercise of its revisional jurisdiction, he would still find himself in inextricable difficulty, as no application was made on his behalf to the Court below to set aside the award. The matter was referred to the arbitrators on the 14th March 1907. The award was filed on the 8th July 1909. The Court thereupon adjourned the case till the 18th July, and directed the parties to file objections, if any, on or before that date. This was in strict conformity with Art. 158 of the second Schedule of the Limitation Act. On the 17th July, it was discovered that the date to which the case had been adjourned was a Sunday; the Court thereupon adjourned the case to the 28th July. We cannot interpret this order in the sense that the time within which objection could be filed was also thereby extended to the 28th July. In fact, it was not competent to the Court to extend the period of ten days prescribed by Art. 158, because under section 5 of the Limitation Act the Court has no authority to receive an application to set aside the award after the expiry of the time prescribed by that Article. The appellant suggests, however, that he was misled by the order of the 17th July 1909 and alleges that he could not appear before the Judge on the date fixed, as the Court was held on that date in a place different from the locality wherein the Court was ordinarily held. It is not necessary for us to determine whether the latter allegation is or is not well-founded on fact. The position is unassailable that no exception was taken within the

CIVIL.

1912.

Surja Narain
v.*Bunwarl Jha.**Mookerjee, J.*

(1) (1901) I. L. R. 29 Cal. 107.

(2) (1891) I. L. R. 18 All. 800.

CIVIL

1919.

Surja Narain

v.

Bunwan Jha.

Mookerjee, J.

time prescribed by Art. 158, and it was not competent to the Court to extend the time prescribed by that Article. It thus became obligatory on the Court to confirm the award. But it has been ingeniously argued that an application to set aside the award was unnecessary, because the award had in the eye of law no existence, as the reference to arbitration was made with the concurrence of a person who had no authority to act on behalf of the guardian of the appellant, an infant at that time. This contention is clearly fallacious. Section 522 of the Code of 1882 provides that if the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in the manner aforesaid (that is, under sections 520 and 521), and, if no application has been made to set aside the award or if the Court has refused such application, the Court shall proceed to give judgment according to the award. The expression 'if no application has been made to set aside the award' is clearly comprehensive enough to cover a case of the present description and refers to a contingency other than the remission of an award. The award, here, if not successfully challenged, would be *prima facie* binding upon the appellant; if there was good reason to assail the award, it was competent to his guardian *ad litem* to apply to the Court to set it aside, within the time prescribed by Art. 158. This was not done; and the Court had thus no other course open than to record an order of confirmation.

It has finally been represented to us that the appellant, at the time of the proceedings in the Court below, was an infant, and that although he has since then attained majority, he is now insane. This may be a matter for regret, but plainly cannot affect our decision. We do not, however, express any opinion upon another aspect of the matter suggested in the course of argument, namely, whether it is possible for the plaintiff to obtain relief in a separate declaratory suit on the ground of negligence of his guardian *ad litem*. We only hold that the present appeal is incompetent, and that even if we had been invited to interfere in the exercise of our revisional jurisdiction, we could not afford any relief to the petitioner in the events which have happened.

The result is that this appeal is dismissed with costs. We assess the hearing fee at five gold mohurs.

A. T. M.

Appeal dismissed.

CIVIL RULE.

Before Mr. Justice N. Chatterjee and Mr. Justice Newbould.

HARI LAL

v.

PARYAG RAM AND OTHERS.*

Appeal—Order refusing temporary injunction—Civil Procedure Code (Act V of 1908), O. XXXIX R 1 and O. XLIII, R. 1 (r).

An appeal lies under Rule 1 (r) of Order XLIII of the Code of Civil Procedure against an order refusing a temporary injunction.

An order under Rule 1 of Order XXXIX of the Code of Civil Procedure refers to any order passed under that Rule and thus includes an order refusing temporary injunction.†

Application for revision by the Plaintiff.

Suit praying for temporary injunction.

The question for decision was whether an appeal lay against an order refusing a temporary injunction. The first appellate Court answered it in the negative.

Babu Surendra Nath Ghosal for the Petitioner.

Babus Umakali Mukherji and *Sudhansu Sekhar Mukherji* for the Opposite Party.

C. A. V.

The judgment of the Court was as follows :

The question for decision in this Rule is, whether an appeal lies against an order refusing a temporary injunction.

Order 43, Rule 1 (r) provides for an appeal against an order under Rule 1 of Order 39. Order 39, Rule 1 lays down that the Court may by order grant a temporary injunction. Now, section 588, cl. 24 of the old Code (Act XIV of 1882) gave an appeal against orders under section 492, and section 492 laid down that the Court may by order grant a temporary injunction or refuse such injunction. The words "or refuse such injunction" have been omitted from Order 39, Rule 1 of the present Code, and it is contended for the opposite party, that as Order 43, Rule 1 (r) provides for an appeal, only against an order under Order 39, Rule 1, and as the only order mentioned in Order 39, Rule 1 is an order granting an injunction, an appeal lies only against an order granting an injunction and not against an order refusing it.

But although the words "or refuse such injunction" have been omitted from Order 39, Rule 1, there can be no doubt that the Court has the power to refuse an injunction. Order 39, Rule 1 merely lays down under what circumstances the Court may by order grant a temporary injunction. It cannot

* Civil Rule No. 284 of 1913, against an order of O. C. Pitter Esq., District Judge of Gya, dated the 21st February, 1913 affirming that of Babu B. O. Basu, Subordinate Judge of Gya dated the 18th November, 1912.

[† See *Lachmi Narain v. Ram Charan*. (1918) 11 A. L. J. 618—Rep.]

CIVIL.

1918.

March, 28.

April, 14.

April, 14.

CIVIL

1918.

Hari Lal

Paryag Ram.

be said that the only order which can be passed by the Court is an order granting an injunction.

The Court "*may*" grant; it is not bound to grant, an injunction. The fact that the Court "*may*" grant an injunction if the matters stated in the Rule are proved, implies that the Court, has the power to refuse an injunction, if those facts are not proved. So that notwithstanding that the words 'or refuse such injunction' have been omitted from Order 39, Rule 1, the Court has as much power to refuse such an injunction under the present Code as it had under section 492 of the old Code which expressly stated that the Court may refuse the injunction. If the words "an order under Rule 1 of Order 39" in Order 43, Rule 1 (r) mean only an order granting an injunction, we must hold that the only order which can be passed under Order 39, Rule 1 is an order granting an injunction, in other words, that an order refusing an injunction cannot be passed under that Rule. This certainly cannot be held. Order 39, Rule 1 is the only Order under which the Court can deal with an application for temporary injunction, and there is no other section which gives the Court power to refuse an injunction. "An order under Rule 1 of Order 39" therefore refers to any order passed under Order 39, Rule 1, and since under that Rule, the Court has the power of refusing an injunction, we think an appeal lies against an order refusing an injunction. The view we take is supported by the observations of the Privy Council in the case of *Reasut Hossein v. Hadjee Abdoollah* (1), where in considering the question whether section 76 of the Registration Act VIII of 1871 (of which the final words were "no appeal lies from any order made under this section"), excluded an appeal not only where the Judge directed the Registrar to register a deed, but also when the application for registration was rejected, it was observed "Their Lordships would have great difficulty in saying that an order of rejection does not fall within the term "an order made under this section," because, if the Judge does not make his order of rejection under the 76th section, it is difficult to see what other section gives him jurisdiction to make it," but their Lordships did not think it necessary to decide the point in that case.

Section 104 of the new Code no doubt lays down that an appeal shall lie from the orders mentioned in that section and save as otherwise expressly provided in the body of the Code, or

(1) (1876), I. L. B. 2 Calo. 181.

by any law for the time being in force from no other orders, and clause (i) mentions "any order made under Rules from which an appeal is expressly allowed by Rules." But clause (r) of Rule 1, Order 43 expressly gives an appeal from an order under Rule 1 of Order 39 and if an order refusing to appoint a receiver is an order under that Rule, an appeal is expressly allowed from such an order under clause (r).

In all the clauses (except one) of Rule 1, Order 43 the words used are "an order," but the clauses themselves show that "an order" under a particular Rule includes an order refused under that Rule, although the Court is not expressly authorized by that Rule to pass an order of refusal. For instance clause (c) gives an appeal against "an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit." But Order IX, Rule 9 says that the Court "shall make an order setting aside the dismissal" if satisfied of certain matters. It does not expressly authorize the Court to reject an application for setting aside an order of dismissal, but clause (c) of Order 43, Rule 1 shows that an order rejecting such an application is an order under Order IX, Rule 9. Similarly clause (t) in Order 43, Rule 1 gives an appeal against "an order of refusal under Rule 19 of Order 41 to re-admit or under Rule 21 of Order 41 to rehear an appeal" although those Rules do not expressly authorize the Court to pass orders of refusal. Similar observations apply to clauses (d), (k), (n) and (o) of Order 43, Rule 1. So that notwithstanding the fact that the Rules to which they refer mention only orders granting an application, the clauses themselves show that orders of refusal are within the Rules. Some of the clauses of Rule 1, Order 43 expressly give a right of appeal only against an order of refusal, and they do not create any difficulty, because the Legislature expressly restricts the right of appeal against order of refusal. But clauses (j), (l) and (m) give a right of appeal against an order granting an application as well as against an order of refusal. Clause (j) refers to orders under Rule 72 and Rule 92 of Order 21 setting aside or refusing to set aside a sale, but Rule 92 expressly provides for confirming as well as for setting aside a sale whereas Rule 72 provides only for setting aside a sale. Clause (m) gives an appeal against an order under Rule 3 of Order 23 recording or refusing to record an agreement or compromise, but Rule 3 only provides for the Courts ordering an agreement or compromise to be recorded and does not expressly authorize

CIVIL

1918.

Hari Lal

Paryag Ban.

CIVIL

1918.

Hari Lal

Parjag Ram

the Court to refuse to do so. Similar observations apply to clause (1). It may be said that when an appeal was intended to be given both against an order of refusal as well as against an order granting an application, it is so expressly stated as in clauses (j), (l) and (m); but the same argument might have applied to some of the clauses of section 588 of the old Code. Clause 7 gave an appeal from orders under section 111, setting off, or refusing to set off one debt, against another and Clause 16 gave an appeal from orders under section 312 or section 313 for confirming, or setting aside or *refusing* to set aside a sale. Clause 24 gave an appeal from orders under section 503 (like Order 40, Rule 1 of the present Code to which it corresponds) mentioned only an order appointing a receiver and not an order *refusing* to appoint a receiver. Section 588, clause 24 did not expressly mention an order refusing to appoint a receiver just as clause (s) of Order 43 Rule 1 does not expressly mention it. But notwithstanding the fact that clauses 7 and 16 of section 588 expressly mentioned orders refusing as well as orders granting and section 503 did not expressly mention an order of refusal, it has always been held that an appeal lay against an order refusing to appoint a receiver: see *Boidya Nath Adya v. Makhani Lal Adya* (1), *Gossain Dulmir Puri v. Tekait Hetnarain* (2), *Venkatasami v. Stridavamma* (3).

However that may be, when clause (r) gives an appeal against an order under Rule 1 of Order 39, and an order refusing an injunction can be passed under that Rule and must be taken as an order under that Rule, we think that an appeal lies against an order refusing an injunction.

The order of the learned District Judge is accordingly set aside, and the case is sent back to that Court for a hearing of the appeal according to law. The costs of this Rule which we assess at one gold mohur, will abide the result.

A. T. M.

Rule made absolute: case remanded.

(1) (1890) I. L. R. 17 Cal. 680.

(2) (1880) 6 O. L. R. 467.

(3) (1886) I. L. R. 10 Mad. 179.

APPELLATE CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and**Mr. Justice Beachcroft.*

TULSI MAHTON

v.

CHETHRU LAL.*.

CIVIL.

1912.

June, 18.

Mortgage—Interest—Sum borrowed for litigation—Immoral or illegal.

A mortgagee is *prima facie* entitled to interest at the rate mentioned in the contract, unless the mortgagor proves that the bond was taken under circumstances which made the provision as to payment of interest not enforceable against him.

It cannot be affirmed as an inflexible rule of law that a debt incurred for the purposes of a litigation is either immoral or illegal.

Where a considerable portion of the debt was incurred with a view to satisfy a mortgage decree in execution whereof the properties covered by the mortgage in suit were about to be sold, and the balance was incurred for the purpose of a litigation :

Held, that the debt incurred was not illegal or immoral.

Appeal by the Defendant.

Suit to enforce a mortgage security. The mortgage was executed by the first defendant and his four sons. The sum secured carried interest at the rate of 9 per cent. per annum with annual rests. The claim was resisted not by the executants of the bond but by six grandsons of the first defendant who had been made defendants. They put the plaintiffs to the proof of the mortgage and appeared to have suggested that the debt, if any, was incurred under circumstances which did not make it binding upon them as grandsons of the first defendant and sons of the other three defendants. They finally contended that the provision for payment of interest was in the nature of penalty and consequently unenforceable. The Court below overruled these objections and made the usual mortgage decree.

Babus Dwarka Nath Mitter and Tarakeswar Pal Chowdhry for the Appellant.

Babus Jages Chandra Roy and Nares Chandra Sinha for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal on behalf of the defendants in a suit to enforce a mortgage security. The mortgage was executed on the 23rd July 1897 by the first defendant and his four sons one of whom was an infant at the time. The sum secured, Rs. 4,775, was repayable on the 6th February 1898, and

* Appeal from Original Decree No. 581 of 1910, against the decree of Babu Kisor Mamon Sirdar, Subordinate Judge of Bhagalpur, dated the 8th August, 1910.

June, 18.

CIVIL

1912.

Tulsi Mahlon

v.
Oshethru.

Mookerjee, J.

carried interest at the rate of nine per cent. per annum with annual rests. No payment appears to have been made, and on the 28th January 1910, a few days before the expiry of the period of limitation, the mortgagees commenced this suit to recover the mortgage money with interest and costs. The claim was resisted, not by the executants of the bond, but by six grandsons of the first defendant, who had been made defendants as interested in the equity of redemption. They put the plaintiffs to the proof of the mortgage and appear also to have suggested that the debt, if any, was incurred under circumstances which did not make it binding upon them as grandsons of the first defendant and sons of the other three defendants. They finally contended that the provision for payment of interest was in the nature of a penalty and consequently unenforceable. The Court below has overruled these objections and made the usual mortgage-decree which is attempted to be challenged in this appeal.

It has been contended, in the first place, that the bond has not been duly proved. There is no substance in this contention, because one of the attesting witnesses proves the execution, as also attestation by himself and by some of the other attesting witnesses who are dead. It has been faintly suggested that it was necessary to call two attesting witnesses. This plainly is not required by section 68 of the Indian Evidence Act.

It has been argued, in the second place, that the provision for payment of interest is in the nature of a penalty. This objection is wholly groundless. As already stated, the rate of interest is nine per cent. per annum with annual rests. No doubt the plaintiffs claim as interest a sum of Rs. 9,269 upon the principal sum of Rs. 4,775. But it must be remembered that more than twelve years had elapsed before the suit was brought, and the sum claimed as interest would have been due if simple interest had been calculated at 15 per cent. per annum upon the principal sum. As was pointed out by this Court in the cases of *Surya Narain Singh v. Jogendra Narain Roy* (1) and *Prayag Kapri v. Shyam Lal* (2), the mortgagee is *prima facie* entitled to interest at the rate mentioned in the contract. The defendants have wholly failed to prove that the bond was taken under circumstances which made the provision as to payment of interest not enforceable against them.

It has been argued finally that the debt was of such a

(1) (1892) I. L. R. 20 Calo. 867. (2) (1903) I. L. R. 31 Calo. 138.

character that no obligation is imposed upon the grandsons of one of the executants and the sons of the other executants, in respect thereof. No attempt, however, was made in the Court below to establish that the debt was either illegal or immoral. The recitals in the bond indicate that a considerable portion of the debt was incurred with a view to satisfy a mortgage decree in execution whereof the properties covered by the present mortgage were about to be sold. The history of this debt has not been traced further. The recitals in the instrument also show that in so far as the other debts mentioned therein are concerned, some were incurred for the purposes of a litigation. It cannot be affirmed as an inflexible rule of law that a debt incurred for the purposes of a litigation is either an immoral or illegal debt. Reference has been made in this connection to the decision in *Pureman Dass v. Bhattu Mahton* (1). That, however, was a case of an entirely different description. It was found there that the debt was due on account of a criminal act committed by the father, and the Court held that the obligation which arose under such circumstances could not be deemed enforceable against the sons or grandsons of the debtor. The authorities on the subject will be found reviewed in the case of *Chakouri Mahton v. Ganga Pershad* (2), and the principle deducible from the cases analysed there indicates that a debt of the description now before us cannot possibly be deemed an illegal or immoral debt.

All the objections urged on behalf of the appellants are unsustainable; the appeal is therefore dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1897) I. L. B. 24 Cal. 572.

(2) (1911) 15 O. L. J. 228.

Before Mr. Justice Chitty and Mr. Justice Tannon.

SHĒIKH SAJĒD

v.

SARADA PROSAD CHOWDHURI AND ANOTHER.*

The Indian Registration Act (III of 1877), Sec. 77—Order refusing to register—Review by the Registrar—Final order of refusal—Suit for registration—Limitation—Date from which it runs.

There is no rule of law by which a Registrar is prevented from reviving an application for registration of a document, which may have been struck off his list by reason of the non-appearance or failure to prosecute of the applicant.

* Appeal from Appellate Decree, No. 3235 of 1910, against the decision of E. Panton, Esq., District Judge of Bardwan, dated the 11th July, 1910, affirming that of Babu Rash Behary Mukherjee, Munsiff of Bardwan, dated the 11th August 1909.

CIVIL.

1912.

Tulsi Mahton

v.

Obethru.

Mookerjee, J.

CIVIL.

1912.

February, 4.

CIVIL.

1913.

Bheikh Sajed

Barada Prasad.

Where therefore an application for registration of a document was struck off by the Sub-Registrar and the applicant applied to him for a review of that order and the latter after taking evidence on both sides subsequently passed the final order refusing to register the deed :

Held, that the subsequent order was the order of refusal in respect of which the applicant was entitled to institute the suit in the civil Court, and the period of thirty days ran from the date of that order.

Appeal by the Plaintiff.

This appeal arose out of a suit under section 77 of the Registration Act to enforce compulsory registration of a *kobala*. Plaintiff alleged that the defendants executed the *kobala* on 2nd April, 1908, and on their refusal to register it, he applied to the Registrar, Burdwan, on 9th May, 1908, to have it registered. On 27th August, 1908, the case was struck off by the Registrar as he declined to grant further adjournment. On 18th September, 1908, plaintiff applied to the Registrar for review of his last order. On 5th January, 1909, the defendants did not object to the restoration of the case, and they filed a written statement denying the execution of the deed. On 28th January, 1909, the registrar after taking evidence on both sides passed an order refusing to register the deed. Hence the present suit, and it was instituted on 26th February, 1909.

Defendants contended *inter alia* that the suit was barred by limitation.

The Court of first instance held that the suit was barred by limitation inasmuch as limitation ran from 27th August, 1908, the date of the order striking off the case. On appeal the learned District Judge affirmed the decision of the first Court.

Against that decision the plaintiff appealed to the High Court.

Babu Atul Krishna Roy for the Appellant. The order striking off the case was not an order of refusal under section 76 of the Registration Act. The words "striking off" have been explained in the case of *Dhonkal Singh v. Phakkar Singh* (1). The Registrar had inherent power to grant a review: see *Hiralal Mukerji v. Premamoyee Debi* (2) and *Reasut Hossein v. Hadjee Abdoolah* (3). Besides, in this case there was a waiver by the defendants: see *Gurdeo Singh v. Chandrikah Singh* (4). Limitation ran from the date of the order when after taking evidence on both sides the Registrar passed his final order of refusal to register the deed. The suit being instituted within 30 days from that date it was not barred by limitation.

(1) (1898) I. L. R. 15 All. 84 (F.B.)

(3) (1906) 3 O. L. J. 806.

(2) (1876) I. L. R. 2 Calo. 181.

(4) (1907) 5 O. L. J. 811;

I. L. R. 36 Calo. 193.

Babu Hiralal Sanyal for the Respondents. The suit was barred by limitation. The limitation ran from the date when the case was "struck off" his list by the Registrar for failure of the plaintiff to prosecute the same. The Registrar had no power to grant a review. I rely on the cases of *Mohima Chunder Dhur v. Jugul Kishore Bhattacharji* (1), *Lala Pryag Lal v. Jai Narayan Singh* (2), *Sajibullah Sirkar v. Hasi Khosh Mohamed Sirkar* (3) and *Abdul Hakim v. Latifunnessa Khatun* (4).

The judgment of the Court was as follows :

The only question arising in this appeal is whether the plaintiff's suit under section 77 of the Registration Act was barred by limitation. Under that section, the suit had to be instituted within thirty days after the making of the order of refusal. Taking the facts as stated by the learned District Judge, on the 9th May 1908 the plaintiff appellant applied for registration of a deed of sale dated 2nd April 1908. There were a number of adjournments and, on 27th August 1908, the Sub-Registrar recorded the order "I decline to give further adjournments; the case is struck off." On 18th September 1908, the appellant appears to have applied to the Registrar, for a review of that order and notice was issued to the defendants. On 5th January 1909, the registrar noted "the respondent (i. e. the defendant) does not object to the restoration of the case and files a written statement denying the execution of the deed." Evidence was accordingly taken on both sides and the Registrar decided in favour of the defendants and, on 28th January 1909, passed the final order refusing to register the deed. This suit was instituted on 26th February 1909, admittedly within thirty days of the order of 28th January 1909, but, of course, for more than thirty days after the order of 27th August 1908. Both the Courts have held that the order of 27th August 1908 was the order of refusal and have accordingly dismissed the plaintiff's suit as barred by limitation. On the facts, we do not think that this decision was correct. It is conceded by the learned pleader for the defendants (and, indeed, his argument is based upon it) that the Registrar is not a civil Court governed in all respects by the rules of the Code of Civil Procedure. He is an executive officer, and, as such, there is no rule of law, so far as we know, to prevent him from reviving an application which may have been struck off his list by reason of the non-appearance or failure to prosecute of the applicant. This is

CIVIL.

1918.

Sheikh Sajed

Sarada Prasad.

February, 4.

(1) (1881) I. L. R. 7 Cal. 736.

(3) (1884) I. L. B. 18 Cal. 264.

(2) (1895) I. L. B. 23 Cal. 419.

(4) (1908) I. L. B. 30 Cal. 582 (585).

CIVIL.

1913.

Sheikh Sajed

v.

Sarada Prasad.

appears in this case to have done and, what is more, when notice was issued to the defendants, instead of raising any objection to such a course; the defendants did not object. On the contrary they accepted the position and adduced evidence in Court. We think, therefore, that the order of 27th August 1908 was not the order of refusal, but that the order of 28th January 1909 was the order of refusal in respect of which the plaintiff was entitled to institute the suit in the civil Court.

The appeal must accordingly be allowed and the case remanded to the Court of first instance to determine the question of fact whether the deed was, in fact, executed by the defendants or not. Costs of this appeal will be costs in the case. We assess the hearing fee at two gold mohurs.

The appellant is entitled to a refund of the Court-fee on this appeal.

A. N. R. C.

Appeal allowed: case remanded.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

BHAJAHARIDAS ADHIKARI

v.

BHAGABATI DASL.*

CIVIL.

1913.

August, 15, 1913.

*Mortgage—Mortgagor vested with two rights—Ohukdari and jotedari interests—
Mortgage deed—What passes.*

When a mortgagor effects a mortgage of his interest in a *chuk*, in the absence of any express reservation, the presumption is that he gives by way of security all interest of whatever kind he possesses in the land.

Gow v. Mubendo (1) followed.

The words of a deed, executed for a valuable consideration, should be construed, as far as they properly may, in favour of the grantee.

Nell v. Deconshire (2) followed.

Appeal by some of the Defendants.

Suit to enforce a mortgage security.

One D, now represented by his widows, the first two defendants, executed four successive mortgages. The first was executed in 1889 in favour of the third defendant, one of the appellants. The second was in favour of H and took place in 1892. The third was in favour of T, executed on the 29th April, 1894; and the last was in favour of the plaintiff on the 21st November, 1899 and it was stated that out of the consideration

* Appeal from Original Decree No. 10 of 1910, against the decree of Babu Ambika Churn Mookerjee, Subordinate Judge, Midnapur, dated the 28th September, 1909.

(1) (1906) 9 C. W. N. 710

(2) (1883) 8 A. C. 185 (149).

for this mortgage, the claim of the third mortgagee was satisfied. In execution of a decree by the third defendant under section 90 of the Transfer of Property Act, on the 11th July, 1900, the right, title and interest of the mortgagor in the five parcels in dispute were sold. In execution of a decree in which the plaintiff was a party, obtained by the second mortgagee, the properties were purchased by the decree-holder on the 20th March, 1905. The plaintiff sued on his mortgage and his contention was that the mortgagor had a two-fold right in those lands, namely, a *chakdari* right (or the interest of a tenure-holder) and a *jotedari* right (or the interest of an occupancy raiyat), that the superior interest alone was covered by the previous mortgages, while the subordinate interest was covered by her mortgage. The defence was that the whole interest passed. The lower Court passed a decree in favour of the plaintiff.

Babu Trailakhya Nath Chakrabarti for the Appellant.

Babus Nilmadhub Bosu and *Khirode Narain Bhunia* for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal on behalf of some of the defendants in a suit to enforce a mortgage-security. Dhananjoy Roy, the mortgagor, now represented by his widows, the first two defendants, executed four successive mortgages. The earliest in point of time was executed on the 19th March, 1889, in favour of the third defendant, one of the appellants in this Court. The second transaction was in favour of Harekrishna Maity and took place on the 28th July, 1892. This was followed by a mortgage in favour of Titu Charan Das on the 29th April, 1894. The last mortgage was in favour of the plaintiff on the 21st November, 1899, and it is stated that out of the consideration for this mortgage the claim of the third mortgagee was satisfied. The third defendant who is the first mortgagee sued to enforce his security and obtained a decree on the 24th May, 1895. To this decree the parties were the mortgagor, and the second and third mortgagees. In execution of this decree, he purchased on the 22nd March, 1897, a parcel, No. 16, which has been released in his favour by the Court below. He subsequently obtained a supplementary decree under section 90 of the Transfer of Property Act, and on the 11th July, 1900, purchased the right, title and interest of the mortgagor in the five parcels now in dispute. The second mortgagee Harekrishna Maity also sued to enforce his security and obtained a decree on the 24th November, 1902 ;

OFFICE

1912.

Bhajaharidas
v.
Bhagabati Dasi.

August, 10.

CIVIL

1912.

Bhajaharidas

v.
Bhagabati Das;

Mookerjee, J.

to this decree the parties were the mortgagor, and the third and fourth mortgagees, of whom the last is the plaintiff in the present suit. In execution of this decree the properties were purchased by the decree-holder on the 20th March, 1905. The third mortgagee Titu Charan Das sued to enforce his security and obtained a decree on the 5th August, 1897. To this decree the only party was the mortgagor. The plaintiff, as the fourth mortgagee, now sues to enforce his security, and, the substantial point in controversy between the parties at this stage is, whether this mortgage can be enforced against five parcels mentioned in the schedule to the plaint, namely, 12, 13, 14, 15 and 17. The contention of the appellant is that the mortgagor had a two-fold right in these lands, namely, a *chakdari* right (or the interest of a tenure-holder) and a *jotedari* right (or the interest of an occupancy raiyat), that the superior interest alone was covered by the previous mortgages, while the subordinate interest is covered by her mortgage, and, that, consequently, her right in these parcels as mortgagee has not been affected in any way by the sales in execution of the decrees on the previous mortgages. This claim is resisted on a two-fold ground; namely, *first*, that the mortgagor had no *jotedari* right in these parcels independent of his *chakdar's* right; and, *secondly*, that if he had a two-fold right, his whole interest was included in the previous mortgages, so that the interest of the plaintiff as fourth mortgagee of the occupancy right alone was extinguished when she failed to redeem as directed by the decree obtained by the second mortgagee, from whom the third defendant appellant has subsequently taken a settlement. The Subordinate Judge has overruled these contentions and made a decree in favour of the plaintiff. That decree has been assailed in this Court on the grounds just mentioned. In our opinion, the decision of the Subordinate Judge cannot be supported. The evidence does not establish that the mortgagor had a two-fold right in the disputed parcels. No direct evidence has been adduced in support of the theory that the mortgagor had two-fold right in these parcels of lands, namely, a superior interest as *chakaar* or tenure-holder and a subordinate interest, as *jotedar* or occupancy raiyat. There is no indication in the evidence that at any time in the history of these parcels, there were in two different persons two distinct rights of the character mentioned. If there had been such evidence available, the question would have arisen, when did the two distinct interests combine in the same person and what was the legal

effect thereof. It is not suggested that the mortgagor had any co-sharers in the property and that he could, by any possibility, as a share-holder in the *chakdari* interest, have acquired also the interest of a subordinate tenant and kept it alive. Presumably, therefore, if the two interests existed, when they vested in the plaintiff, the principle of merger would have applied. But whether by any device the two interests, after they had been vested in the same person, could have been kept alive and distinct, is a matter which we need not consider in the present case, because there is no foundation laid in the evidence either to prove the existence of two distinct interests, or to show that if two distinct interests existed, they ever vested in the mortgagor or his predecessor in interest. Our attention, however, has been drawn to the deposition of one of the witnesses for the third defendant who stated that after purchase by that defendant, rent was paid to the mortgagor as *chakdar*. The passage in question is by no means clear and is not sufficient to establish the existence of a *jotedari* right independent of and subordinate to the *chakdari* right. The learned *vakil* for the plaintiff respondent has laid much stress upon the recitals in the successive mortgage-bonds and upon the description of the property conveyed thereby. In our opinion, these descriptions do not lend any support to the theory that there was a *jotedari* right independent of the *chakdari* right. On the other hand, the description in the second mortgage indicates that the whole of the interest of the mortgagor in the property described as the *chak* of 200 bighas was transferred to the mortgagee. As was pointed out by this Court in the case of *Foy Dutt Kha v. Bazeo Ram Singh* (1), when a proprietor is in possession of *nij jote* lands, it cannot be said that he has in respect of such lands an interest subordinate to the proprietary interest so that when his interest as proprietor disappears, along with it must disappear his interest in the *nij jote* lands. It is further clear from the decision in *Gowri Chandra Gajapati v. Mukunda Deb* (2) that when the mortgagor effected a mortgage of his interest in the *chak*, unless there was express reservation, the presumption would follow that he had given by way of security all interest of whatever kind he possessed in the land; for, in the words of Lord Coke, "it is a maxim in law that every man's grant shall be taken by construction of law most forcible against himself, which is so to be understood that no wrong be thereby done" (Co. Litt. 183 a, b), or as Lord

CIVIL.

1912.

Bhajaridas

Bhagabati Dast

Mookerjee, J.

(1) (1887) 7 W. R. 40. (2) (1905) 5 O. W. R. 710.

CIVIL

1912.

Bhojsharidass
Bhagabai Dasi.
Mookerjee, J.

Selborne puts it, "the words of a deed, executed for a valuable consideration, ought to be construed, as far as they properly may, in favour of the grantee": *Neill v. Devonshire* (1). Upon an examination of the successive mortgages, it is manifest that there was no reservation made by the mortgagor in any of them of an interest in the property described as *chak*. We must hold therefore that even if it were established that the mortgagor had a *jotedari* right subordinate to the *chakdari* right, his entire interest was transferred to the second mortgagee, so that when the plaintiff failed to redeem as directed by his decree, her interest in the disputed parcels was extinguished. In this view of the matter, it is clear that the plaintiff is not entitled to enforce her security as against plots Nos. 12, 13, 14, 15 and 17.

We may add that it was suggested on behalf of the respondents that this position cannot be assumed by the third defendant, because the settlement alleged by him from the purchaser at the sale in execution of the decree on the second mortgage, has not been established. It cannot be disputed that the third defendant by virtue of his purchase of the disputed plots at a sale in execution of a money-decree against the mortgagor did not acquire an interest superior to that of the plaintiff; he can succeed, only on the strength of the title, if any, acquired by the purchaser at the sale in execution of the decree on the second mortgage. The question, therefore, does arise, whether the third defendant has established his alleged settlement from the purchaser. In our opinion, the reasons given by the Subordinate Judge for the adverse view taken by him, are by no means conclusive. The alleged settlement is supported by the representatives of the second mortgagee, and the surrounding circumstances make such a settlement very probable. The third defendant had purchased these parcels on the 11th July 1900; he had subsequently to face the claim of the plaintiff. The only way in which he could protect himself was by acquisition of a title from the representatives of the second mortgagee. This, he asserts, he has done, and there is no good reason why he should not be believed. We are, therefore, of opinion that, for the purposes of this litigation, it has been proved that the third defendant is entitled to challenge the title of the plaintiff.

It is worthy of note that if the third defendant had failed to establish his title, the plaintiff would have been met by a fresh

(1) (1882) 8 App. Cas. 185 (149).

difficulty. The plaintiff was bound to bring on the record the representatives of the second mortgagee; if the third defendant is not such representative, the suit has been improperly constituted. It must, therefore, either fail, or be retried after all the necessary parties have been brought on the record.

The result is that the appeal by the third defendant must be allowed and the decree of the Subordinate Judge modified. The plaintiff will be entitled to proceed in execution of her decree against the properties other than those exempted by the lower Court namely plots 1 and 16 as also the plots now exempted namely, 12, 13, 14, 15 and 17. This appellant is entitled to the costs of this appeal. We assess the hearing fee at five gold mohurs. The appeal of the eleventh defendant will, however, stand dismissed with costs. We assess the hearing fee against him in favour of the respondent at three gold mohurs. The appeal by the other defendants will also stand dismissed, but without costs. The decree of the Court below, except in so far as it is varied, will stand confirmed.

A. T. M.

Appeal allowed: decree modified.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

KENARAM BAKSHI

v.

KAILAS CHANDRA DUTT.*

Decree, execution of—Decree-holder's right to withdraw application—Order allowing withdrawal of execution proceedings—Appeal—Bid, if and when can be retracted—Decree-holder's clerk, bid by, on behalf of decree-holder—Decree-holder, if can withdraw from bid.

A decree-holder cannot, as a matter of right, discontinue the execution proceedings at any stage at his option.

An order allowing the decree-holder to withdraw the execution proceedings is not appealable.

A bid is a mere offer and can be retracted by the bidder at any time before the auctioneer announces the completion of the sale by the fall of the hammer or other customary method.

An auctioneer is an agent of the owner of the property and till he accepts the bid, the matter is open and the bidder is at liberty to withdraw his bid.

A decree-holder can withdraw the bid offered by his clerk with his assent and on his behalf, before it has been accepted by the Court.

* Appeal from Order No. 78 of 1918 with Civil Rule No. 220 of 1918, against an order of T. S. Macpherson, Esq., District Judge of Maudhum, dated the 23rd December, 1912, reversing that of Moulvi Ali Ahmad, Subordinate Judge of Maudhum, dated the 15th August, 1912.

CIVIL

1912.

Bhajaharidas

v.

Bhagabati Dasi,

Mookerjee, J.

CIVIL

1918.

March, 19.

CIVIL.

1918.

Kannam

Kailas Chandra.

Appeal and application for revision, by the decree-holder. In execution of a mortgage decree, the mortgaged property was put up for sale. Out of three bidders, one was decree-holder's clerk, who professed to bid for the decree-holder. The clerk's bid was higher than those of others, but the officer conducting the sale reported this fact (*i.e.*, the bid by decree-holder) to Court. Meanwhile the decree-holder himself appeared and stated that his clerk had no authority to offer any bids on his behalf and that he himself was not prepared to take the property at that amount bid by his clerk. The Court, notwithstanding this repudiation, ordered that the clerk's bid be accepted, if no higher bid was offered. Thereupon the decree-holder applied for leave to withdraw the execution proceedings. This application was granted. The judgment-debtor then appealed to the lower appellate Court against the order of withdrawal and the matter was remanded for enquiry and decision.

Babu Bepin Behary Ghose for the Appellant and the Petitioner.

Babu Brojo Lal Chakravarti for the Respondent and the Opposite Party.

The judgment of the Court was delivered by

March, 19.

Mookerjee J.—We are invited in this Rule to consider the propriety of two orders, one made by the Subordinate Judge and the other by the District Judge on appeal, in the course of proceedings in execution of a mortgage decree obtained by the petitioner, on the 6th January 1912. In execution of the decree, the mortgaged property was put up for sale on the 15th August 1912. There were three bidders, one Sreenath Chakrabarty who professed to bid for the decree-holder, and two other persons, Asutosh Halder and Abinash Chandra Ghose. On behalf of the decree-holder, Sreenath Chakrabarty offered a bid for Rs. 1,940. The officer conducting the sale reported this fact to the Subordinate Judge. Meanwhile the decree-holder himself appeared and stated that his clerk had no authority to offer any bids on his behalf and that he himself was not prepared to take the property at a higher figure than Rs. 1,000. The Subordinate Judge, notwithstanding this repudiation, ordered that the last bid be accepted, if no higher bid was offered. Thereupon the decree-holder applied for leave to withdraw the execution proceedings. This application was granted. The judgment-debtor then appealed to the District Judge against the order of withdrawal. A preliminary objection was taken before the Judge that the order

in question was not appealable. This objection was overruled and the appeal was heard on the merits. The District Judge held, *first*, that it was necessary to determine upon evidence whether or not the clerk had authority from his master to offer bids on his behalf; *secondly*, that the Subordinate Judge should not have, without such enquiry, granted the application of the decree-holder to withdraw the execution proceedings at that stage; and, *thirdly*, that if the bid was found to be wholly unauthorised, it must be deemed void, and the sale completed in favour of the next lower bidder, and failing him, the bidder below. In this view, the District Judge has remanded the case for reconsideration. The propriety of this order is now assailed by the decree-holder. In our opinion, the order of the Subordinate Judge as also that of the District Judge must be discharged. It is clear that the Subordinate Judge should not have allowed the decree-holder to withdraw from the execution proceedings at the stage they had reached. The decree-holder cannot, as a matter of right, discontinue the execution proceedings at any stage at his option. If he was permitted to do so, the judgment-debtor might be needlessly harassed, and, seriously prejudiced. But it is equally clear that the order of the Subordinate Judge was not liable to be challenged by way of appeal. It has, indeed, been argued that the order was made under section 47 of the Civil Procedure Code of 1908, but the contention is plainly untenable. The order allowing the decree-holder to withdraw the execution proceedings, did not determine any question between the parties to the suit relating to the execution, discharge or satisfaction of the decree. Consequently the District Judge was not competent to deal with the questions raised before him on appeal. But we are further of opinion that the order of the District Judge cannot be supported on the merits.

It is needless to consider, whether the clerk had or had not authority from his master to offer bids on his behalf. If it be assumed that he was not authorised, possibly the judgment-debtor might have asked the Court to accept the bid as the bid of the clerk himself. This the judgment-debtor did not do, for the obvious reason that the clerk was not a man of substance, and if, after his bid had been accepted, he failed to make the requisite deposit, no effective steps could be taken against him. Besides, as the clerk has not been made a party to these proceedings, it is impossible for us to give any directions so as to bind him. The judgment-debtor has hitherto sought

CIVIL
1918.
Kamaram
c.
Kallab Chandra,
Mookerjee, J.

CIVIL.

1918.

Kenaram

Kallal Chandrasekhar

Mockerjee, J.

to bind the decree-holder alone by the bid offered by his clerk, and the only point for consideration is, whether the decree-holder is so bound, even if it be assumed that the clerk had authority to offer bids to the extent he did. We are of opinion that the decree-holder is not bound by the bid, because even if it had been offered by him personally, he would have been competent to withdraw the bid any moment before acceptance. This argument is supported by the decision in *Agra Bank v. Hamlin* (1), where it was ruled that it was competent to the bidder to withdraw his bid before the sale had been completed. This view is well founded on principle and is in accord with that accepted in England in cases of unquestionable authority. It is well-settled that a bid is a mere offer and can be retracted by the bidder at any time before the auctioneer announces the completion of the sale by the fall of the hammer or other customary method: *Payne v. Cave* (2). As was explained by Lord Kenyon in the case mentioned, "the auctioneer is the agent of the vendor and the assent of both the parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not inaptly called *locus penitentiae*. Every bidding is nothing more than an offer on the one side, which is not binding on the other side, till it is assented to. But according to what is now contended for, one party would be bound by the offer and the other not, which can never be allowed." We are not unmindful that dissatisfaction has sometimes been expressed with this view, and, the suggestion has been made that it would have been better to hold that every bid constitutes "an actual sale, subject to the conditions that no one else shall bid higher." (Langdell, Summary of Contracts, section 19). But the rule laid down in *Payne v. Cave* (2), has been accepted as good law, and it was challenged unsuccessfully in *Warlow v. Harrison* (3); where Lord Campbell pointed out that the auctioneer was the agent for the owner of the property and that till he had accepted the bid, the matter was open and the bidder was at liberty to withdraw his bid. [Laws of England, ed. Halsbury, Vol. I, Secs. 10, 39]. A similar view was accepted by this Court in *Mackenzie Lyall v. Chamroo Singh* (4). In the case before us, even if it be assumed that the bid offered by the clerk

(1) (1890) 1 L. R. 14 Mad. 235.

(2) (1789) 8 T. R. 148; 1 R. R. 679.

(3) (1859) 1 E. & B. 809; 23 L. J. Q. B. 21; 29 L. J. Q. B. 14.

(4) (1889) 1 L. R. 16 Calo. 702.

was a bid offered with the assent and on behalf of the decree-holder, it was still open to the decree-holder to withdraw the bid which had not been, up to the time of repudiation, accepted by the Court. In this view of the matter, the proper course for the Subordinate Judge to adopt was to direct a resale of the property forthwith. [See also Civil Procedure Code, 1908, Appendix E, Form No. 29, Conditions of Sale, Nos. 2 and 3]. This was not done, and at this distance of time, a resale cannot rightly be directed without the issue of a fresh sale proclamation.

The result is that the Rule is made absolute and the order of the Subordinate Judge as also that of the District Judge discharged. The case is remitted to the Court of first instance in order that a fresh sale proclamation may be issued and a sale held in due course, on the basis of the original application for sale of the mortgaged properties, which will stand revived by virtue of this order. There will be no order for costs in this Rule.

The decree-holder has, in the alternative, preferred an appeal against the order of the District Judge, which we have just discharged in the exercise of our revisional jurisdiction. The appeal is obviously incompetent and is dismissed without costs.

A. T. M.

Appeal dismissed and Rule made absolute.

PRIVY COUNCIL.

PRESENT: *Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.*

KUNWAR BRIJRAJ SINGH AND ANOTHER

v.

KUNWAR SHEODAN SINGH AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.]

Hindu Law—Mitakshara Joint family—Partition—Ancestral property—Head of the family, power of, to partition by will—Will, requisites of—Calling the instrument of partition a will, effect of—Family arrangement—Acceptance thereof by members of the family—Provision for forfeiture in case of bad behaviour, effect of.

In the ancestral property the members of a Hindu joint Mitakshara family have independent right with which the head of the family cannot interfere, and therefore, he has no right to make a partition by will of such property among the various members of the family except with their consent, which would bind not only them but also their sons as they would be representing in the transaction their respective branches of the family.

CIVIL.

1918.

Kenaram

Kailas Chandra.

Mookerjee, J.

P. O.

1918.

April 18, 17.
May, 6.

P. O.

1918.

Brijraj Singh

Sheodan Singh.

The head of a Hindu joint family executed a document which was called a will, setting out a division of the ancestral family property among his three sons, reserving nothing for himself, and the evidence established that the partition thereby made was acted upon by all the parties interested :

Held, that a will speaks from a future date, *viz*, the death of the writer, and consequently it was a complete misnomer to apply the term to a document which was intended to speak from the date at which it was written and was, in fact, and was intended to be viewed as, a record of a family arrangement then and there made and carried into effect partitioning the family estate among those interested :

Held also, that the head of the family had no power to make such a partition by will strictly so-called, and that the fact that the document was called a will did not invalidate the partition thereby made and acted upon by all the members of the family.

It was contended that the partition was not intended to take effect *in praesenti* in view of the fact that the document provided that in case of mismanagement or bad behaviour on the part of any of the sons the executant would have power "to cancel the will, which could be enforced from the date of its execution :"

Held, that the highest effect of the provision was that it evidenced a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property and viewed in that light the contractual acceptance of a power of forfeiture in case of bad behaviour was not sufficient to prevent the partition operating *in praesenti*, but that the true interpretation of the provision was that it was merely put in as a threat in order to keep the sons in good behaviour and that it could not have been enforced specifically or at all and was quite insufficient to outweigh the overwhelming evidence that the document was a family arrangement accepted by all parties.

Two consolidated appeals from two decrees of the High Court of Judicature for the North-Western Provinces at Allahabad, both dated the 17th May, 1910, which partly affirmed and partly reversed a decree of the Court of the Additional Subordinate Judge, dated the 30th September, 1907.

The suit was brought in September 1905 by the respondent Kunwar Sheodan Singh and one Rao Karan Singh, since deceased, and their respective sons claiming partition of certain family properties consisting of villages, house property, and moveables of considerable value.

Defendants appellants represented the eldest branch and the respondents the two younger branches of one Rao Balwant Singh, who was admittedly in possession of all the said properties. The case of the respondents, as plaintiffs was that all the properties were ancestral family properties, which were in the joint possession and enjoyment of the parties down to the suit, and

that they (the respondents) were entitled to two equal third shares thereof on partition.

The main defences of the appellants were, *firstly*, that the said properties were not ancestral but were self-acquired properties of the said Rao Balwant Singh, and had been validly disposed of by him by his will, and *secondly*, assuming them to have been ancestral, a partition had been effected by the said Rao Balwant Singh in his lifetime to which all his three sons had assented.

On the first plea the Subordinate Judge found that all the properties in suit were ancestral, and this finding was not questioned in appeal to the High Court.

On the second plea the Subordinate Judge held that a valid partition had been made of the various villages and certain other property of the family, but not of the house properties or moveables of which he decreed partition in the suit. The High Court on appeal held that no such partition had been made and passed a decree therefore in the terms prayed for by the respondents.

The conclusion to which the Subordinate Judge came, was based upon a document dated the 26th November, 1895, which was called a will and executed by the said Rao Balwant Singh. The document, which is detailed in their Lordships' judgment, was treated by the Subordinate Judge as partition deed, and he held that a real partition was effected thereby and that it was acquiesced in as a family arrangement by the respondents, who were therefore estopped from impeaching it.

The learned Judges of the High Court held that the said document was intended to operate only as the will of Rao Balwant Singh and could not be treated as a partition deed; that no real partition of any of the family properties was effected in the lifetime of Rao Balwant Singh, that his two younger sons had not assented to any final division of the estate; and that the allocation of the various villages among the different members of the family, and the mutations of names in the Land Revenue Records, were only intended to provide for the management of the estate, the enjoyment of the properties remaining joint until the date of the suit. The appeal of the respondents was accordingly allowed, and the relief claimed in the first clause of the prayer of the plaint, *viz.*, in effect a general partition of the family properties was decreed, and the cross appeal of the present appellants was dismissed, a separate decree to that effect being passed therein.

P. O.

1918.

Brijraj Singh

Sheodan Singh.

P. O.

1918.

Brijraj Singh
v.
Sheodan Singh.

The defendants thereafter appealed to His Majesty in Council.

DeGruyther, K. C., and *B. Dube*, for the Appellants: The partition actually took place in September 1895 and the document of November 26th 1895 evidences that fact and gives definite specified shares of each member of the family. The effect of the arrangement was that there was a division of the property dealt with in the document and the previously undivided family became by operation of law divided: *Balkishen Das v. Ram Narain Sahu* (1), *Parbati v. Naunihal Singh* (2), and *Raghubir Singh v. Moti Kumwar* (3). There is no evidence to support the contention that the arrangement was temporary. The respondents knew what was going on and the evidence establishes that they acquiesced in the arrangement. All parties acted upon the arrangement made in 1895 which was not disputed for 10 years.

[MR. AMBER ALI referred to *Nawab Umjad Ally Khan v. Mussummat Mohumdee Begum* (4) where the mode of dealing amongst natives living amongst themselves is described.]

The document of November 26th, 1895 shows that there was a partition and whether it is called a will or by any other name does not affect the fact that there was a partition. The house in Aligarh formed a part of the family arrangement and the appellants are entitled to it.

Arthur Grey and *G. R. Lowndes* for the Respondents: The document of November 26th 1895 was registered as a will and all the parties interested treated it as such. It was intended to operate as a will and must now be treated as one. The provision for forfeiture in case of bad behaviour shows that there was no intention to make the partition at that time. The language of the document is only consistent with the fact that there was no partition prior to its execution.

It uses the word "give" meaning "bequeath". Even the defence witnesses say that the partition was made "by or under the will". The document purports to make an unequal division but as between brothers there must be absolute equality whether the partition is made by the father or after his death: Mayne on Hindu Law and Usage, 7th ed., p. 659. The partition made by the document is therefore, outside the Hindu Law. But it is contended to uphold it on the ground that there was consent of the parties concerned. There is, however, no

(1) (1908) L. B. 80 I. A. 189, I. L. B. 80 Calo. 788.

(2) (1909) L. B. 86 I. A. 71, I. L. B. 81 All. 412.

(3) (1912) I. L. B. 85 All. 41. (4) (1867) 11 M. I. A. 517 (544).

evidence of the plaintiffs' consent. Moreover, it must be shown that they consented after full knowledge of the facts and that they knew how the transaction would affect their interests: *Jugo Bundhoo Tewaree v. Kurum Singh* (1). There is no evidence to show such consent. Again the document does not suggest that there was consent. Reliance is placed on mutation proceedings. But the plaintiffs are not thereby estopped from now asserting their rights: *Jagwant Singh v. Silan Singh* (2). Further, mutation does not operate as a transfer: *Muhammad Imam Ali Khan v. Sardar Husain Khan* (3). In fact the property was never transferred to the sons who managed it under the directions of their father. That clearly shows that the arrangement was not acted upon. Reference was made to the Indian Registration Act (III of 1877), sections 17, 18 and 51; and *Nawab Umjad Ally Khan v. Mussummat Mohumdee Begum* (4) where the parties were Muhammadans, was distinguished:

DeGruyther, K. C., in reply, distinguished *Muhammad Imam Ali Khan v. Sardar Husain Khan* (3) where the property in suit was an estate of an Oudh Talookdar.

The judgment of their Lordships was delivered by

Lord Moulton.—This is a suit brought by two brothers, Rao Karan Singh and Kunwar Sheodan Singh (with whom are joined as plaintiffs their respective sons Kunwar Shibraj Singh and Kunwar Ranbir Singh), against the widow and son of their eldest brother Rao Sultan Singh, claiming a partition of certain properties which they allege to be the joint and undivided property of the family to which they belong, in which they are entitled to a two-thirds share. The defence is that the properties originally belonging to the family were the subject of a division by a family arrangement made and acted upon in 1895 during the lifetime of the father of the plaintiffs, and that thenceforward the properties ceased to be held jointly, and that those properties of which the defendants are in possession came to them under that family arrangement and became and still remain their separate property.

The principal subject of dispute is village property. But the suit relates also to certain other property, as to which different considerations arise. It will be convenient in the first instance to determine the questions in issue so far as they relate to the village property only and to consider subsequently the effect of

P. C.

1918.

Brijraj Singh
v.
Sheodan Singh.

May, 5.

(1) (1874) 23 W. B. 841 (845).

(2) (1899) I. L. R. 21 All 285 (287).

(3) (1898) L. B. 25 I. A. 161 (177), I. L. R. 26 Cal. 81.

(4) (1867) 11 M. I. A. 517.

P. O.

1918.

Brijraj Singh

c.
Sheodan Singh.

Lord Moulton.

the facts thus found on the rights of the parties in respect to the other property.

It will be seen from the foregoing that the real issue in the case is whether or not the alleged family arrangement was in fact made and assented to by the parties interested. The defendants' contention in this respect is exceptionally clear and precise. It leaves no doubt as to the terms of the arrangement even in their minutest details, and is equally definite as to the date when and the circumstances under which it was made.

The father of the three brothers was Rao Balwant Singh. In 1895 he was the head of the family, which was then joint and undivided. The village property under his management, and to which this case relates, has been found by the Court of first instance to have been ancestral property, and that finding is acquiesced in by the parties. He was at that date in advanced years and indifferent health, and determined to free himself from the labours of business and devote the remainder of his life to pilgrimages and travel in other countries. Accordingly, on the 26th November 1895, he drew up and executed a document (which he calls a will) setting out a division of the family property among the members of the family, reserving nothing for himself. This is the family arrangement set up by the defendants.

Their Lordships incline to the view that the term "will," as applied to this document, was a complete misnomer. It is manifest that it differed from a will in the crucial characteristic that it was intended to speak from the date at which it was written, and not from a future date, *viz.*, the death of the writer. It was, in fact, and was intended to be viewed as, a record of a family arrangement then and there made and carried into effect partitioning the family estate among those interested. Indeed, in anticipation of this formal partitioning, the sons had been put into possession of their shares some two months previously. All this appears from the concluding passage of the document, which reads as follows:—"All the three sons were put in separate possession of the estate in the beginning of the year 1303 Fasli" (September 1895). "I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence."

There is no doubt whatever as to the authenticity or date of this document. But the property was ancestral and therefore Rao Balwant Singh, although head of the family, had no right to make a partition by will of that property among the various

members of the family except with their consent. They had independent rights in it with which he could not interfere. The main question, therefore, is whether there is evidence sufficient to establish the consent of the plaintiffs Rao Karan Singh and Kunwar Sheodan Singh to this family arrangement. If they accepted it their acceptance would bind not only them but also their sons, who are the remaining plaintiffs as they would be representing in the transaction their respective branches of the family.

Their Lordships are of opinion that the evidence of their acceptance of the partition is overwhelming. To appreciate it fully it will be necessary to examine in some detail the contents of the document itself and the acts of the parties consequent thereon.

That the document testifies to a partition of the estate taking place then and there cannot be doubted. The sons were all adults at the time, and before setting out the specific shares which each was to receive, the document reads thus :

"My three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present while in a sound state of body and mind and of my own free will and accord divided the property among my sons, heirs as follows."

There follows a specific division of the villages by name among the three sons. It then gives certain *sir* lands and other property to his wife for life, and proceeds to provide that at her death the *sir* lands (with the exception of that in the village of Badri) shall go to the wife of the eldest son according to the custom of the family. The *sir* land in the village of Badri is to go to the wife of the plaintiff Kunwar Sheodan Singh, "because the share of Kunwar Sheodan Singh is less than that of Kunwar Karan Singh," the other plaintiff. The remainder of the property held by the wife for life is at her death to be divided among her three grandsons. There are other minor details set out, but the above are the important provisions of the document and will suffice for the decision of the case.

This document was executed on 26th November, 1895. Early in 1896 the plaintiffs and their brother Rao Sultan Singh severally apply for mutation of names in respect of the villages allotted to them by their father in the document. It will suffice to refer to one of these applications, all of which *mutatis mutandis* are substantially identical, For this purpose the appli-

P. C.

1918.

Brijraj Singh

1.

Sheodan Singh.

Lord Moulton.

P. O.

1918.

Brijraj Singh

Sheodan Singh.

Lord Moulton.

cation of Kunwar Karan Singh in respect of the village Nagla Tula Ram may be taken. It is dated 25th February 1896, and reads as follows :

"Application for mutation of names in respect of 20 biswas of the zamindari property of the village of Nagla Tula Ram.

"The applicant begs to state as follows :—The applicant's father Rao Balwant Singh partitioned his property among his heirs under a registered will dated 26th November, 1895 and in accordance with the partition the 20 biswas of the villages of Bajripur and Nagla Tula Ram and 20 biswas of Khumanpur a hamlet of Jirauli Mahal Rao Balwant Singh fell to the applicant's share. Therefore this application is filed and it is prayed that according to it the name of Rao Balwant Singh may be expunged in respect of the village of Nagla Tula Ram and the applicant's name entered in the *khewat*. Separate applications have been filed in respect of the remaining villages. The applicant's elder brother Rao Sultan Singh has filed the original will in a case relating to the village of Sahaoli. It is also a proof in this case."

It will be well to follow up the proceeding thus initiated. On March 19th, 1896, we have the Tahsildar's record of the hearing of the application and the order made thereon. It reads as follows :

"Application for mutation of names in respect of 20 biswas of the village of Nagla Tula Ram, pargana Akraabad, according to partition of the property.

Kunwar Karan Singh, applicant *v.* Rao Balwant Singh.

"Under a will, filed with the record of the mutation case relating to the village of Sahaoli, Rao Balwant Singh, a rais of Sahaoli, divided his zamindari property among his sons. The 20 biswas property of the village of Nagla Tula Ram, in respect of which the name of Rao Balwant Singh stands recorded without the participation of anyone else, has fallen to the share of Kunwar Karan Singh. Kunwar Karan Singh prays that his name may be entered in respect of the village aforesaid. Rao Balwant Singh verifies the application and prays for expungement of his name. In spite of the expiry of the time given in the notice, no objection has been taken. From the office report the property is found to be correct. The patwari of the village says that Kunwar Karan Singh made collections and assessments for *kharrif* of 1303 Fasli. As a transfer in possession has taken place, and no objection has been raised, the name of Rao Balwant Singh be expunged in

respect of the village and the name of Kunwar Karan Singh entered in place of it. The record be submitted to the pargana officer for approval. A fee of Rs. 7 is deposited and the Treasury tender is filed with the record. No penalty is payable."

No more complete evidence that the family arrangement recorded in the so-called will was understood by all parties to be operative from the first and was acted on by them as such can be imagined than these two records, which are merely specimens of similar records relating to the other villages apportioned to the sons. It will be seen that the patwari of the village testifies to the applicant having made collections in 1303 Fasli (September 1895) thus confirming the truth of the statement in the so-called will that it was at that date that the sons entered into possession of the villages allotted to them. It should be added that direct evidence was given on behalf of the defendants that it was on that occasion that Rao Balwant Singh publicly announced his intention of making a partition of the property among the members of the family and gave the possession of the villages to the respective sons.

P. O.

1918.

Brijraj Singh

Sheodan Singh.

Lord Moulton.

There is another set of transactions of a different date, which add strong confirmation to the defendants' case. Rao Sultan Singh died on March 30th, 1901, and his father, Rao Balwant Singh, died a few days later on April 7th, 1901. Thereupon there ensued a situation such that the conduct of the parties must evidence almost conclusively whether the property was regarded as belonging to an undivided family, or whether each son of Rao Balwant Singh held his portion separately. The importance of the situation is emphasised by the fact that the main grievance of the plaintiffs is that the share of the eldest brother is much larger than that of either of his brothers.

The conduct of the parties on this occasion was, in their Lordships' opinion, unambiguous and such as to show conclusively the truth of the defendants' contention. We find that application was made in July 1901 by the widow of Rao Sultan Singh on behalf of her son Rao Brijraj Singh for mutation of names with regard to the property held by her late husband. The following is the record :

"Amendment of *khewat*,

"Rao Brijraj Singh, minor, under the guardianship of Musammat Rani Piari Kunwar,

In the matter of the death of Rao Sultan Singh.

"Village of Sumera *alias* Bijaigarh, pargana Akrabad, 17th July 1901,"

P. O.

1918.

Brijraj Singh
v.
Sheodan Singh.
Lord Moulton.

"To-day this case is put up in the presence of Kunwar Karan Singh and Kunwar Sheodan Singh and their statements have been taken down. They admit that the property aforesaid entered as Holding No. 2 measuring 280 bighas stands recorded in papers in the name of Rao Balwant Singh and that the same was declared to be in the share of Rao Sultan Singh under a will. Rao Sultan Singh is dead and his heir is Rao Brijraj Singh, whose name be entered. The patwari bears testimony to possession and other sharers have taken no objection. It is

Ordered :

That the name of Rao Balwant Singh be expunged in respect of Holding No. 2 and the name of Rao Brijraj Singh be entered in papers and that the Sadar Munsarim do comply with the order."

There then follows the record of the statement made by Kunwar Karan Singh on that application. It reads as follows :

"Present : Haji Mohammad Makhdum Husain, Settlement Deputy Collector at Aligarh.

"17th July, 1901.

"Rao Brijraj Singh, minor, under the guardianship of Musammat Rani Piari Kunwar in the matter of the death of Rao Sultan Singh.

"Village of Kumera (?) *alias* Pijaigarh.

"Statement of Kunwar Karan Singh.

"My father's name is Rao Balwant Singh : age, thirty-three years : occupation, zamindari : residence Sahaoli, pargana Akrabad.

"Statement.

"Two hundred and eighty bighas entered as Holding No. 2 stands recorded in the name of my ancestor, Rao Balwant Singh, and the same has, under a will, fallen to the share of my brother Rao Sultan Singh. Rao Sultan Singh is dead, and now his son Brijraj Singh is the owner. His name should be recorded and I have nothing to do with it.

"Signature of Kunwar Karan Singh."

And on the same day the statement of the other plaintiff, Kunwar Sheodan Singh :

"Rao Brijraj Singh, minor, under the guardianship of Musammat Rani Piari Kunwar.

"In the matter of the death of Rao Sultan Singh, village of Sumera *alias* Bijaigarh, pargana Akrabad.

"Statement of Kunwar Sheodan Singh, a rais of Sahaoli,

"Statement.

"My statement is the same as has been made by my brother Kunwar Karan Singh.

"(Sd.) Kunwar Sheodan Singh."

It is not necessary to go into the details of the mutation of names with respect to the *sir* lands. They support the contention of the defendants in substantially the same way as that which has been already given with respect to the village property.

It is now necessary to examine the evidence put forward by the plaintiffs in answer to the case of the defendants, based, as it is, on the unbroken evidence of ten years' conduct of all parties. In the first place the plaintiff Kunwar Karan Singh does not give evidence at all, so that his acts as shown by the records remain undenied and unexplained. The plaintiff Kunwar Sheodan Singh, however, gave evidence. He makes no attempt to deny any of the matters above referred to, nor does he give any explanation why he took no action until the year 1905, *i.e.*, four years after the death of his father and brother and ten years after he had taken possession of his apportioned share. It is not too much to say that he did not attempt to show that there was a single fact known to him in 1905 when he instituted the suit which had not been known to him throughout. He makes it clear, however, that the family had lived in harmony till shortly before the suit was instituted, and lets it be seen that it was the pleaders whom he consulted that suggested that the claim made in this action should be set up. Taken as a whole his evidence leaves the defendants' case entirely unshaken.

The testimony mainly relied upon for the plaintiffs is that of Chiranji Lal. He had been the general agent or factor of Rao Balwant Singh, and continued to transact the business in respect of the village properties for the sons after 1303 Fasli (September 1895). He was in a position to give most important evidence, for he must have known all the facts of the case, and if his evidence could be relied on, the fact that he gave evidence for the plaintiffs would have great weight. Unfortunately the very fact that he was in a position to know everything makes it impossible to accept his evidence as reliable. He was no more able to explain away the public acts of the plaintiffs to which reference has been made than could they themselves, and the contrast between his evidence and their conduct is enough of itself to throw the gravest doubt on the reliability of that evidence.

P. C.

1918.

Brijraj Singh

Sheodan Singh.

Lord Moulton.

P. O.

1918.

Brijraj Singh

Sheodan Singh

Lord Moulton.

But an examination of his evidence shows in other ways that it is unreliable. Separate account books of the villages allotted to Sultan Singh were put to him by the defendants, and he admitted that they were in his own hand-writing, and kept by him. One of these books contains the receipts of those villages, in the case of the year 1897. He admits that it contains a statement in his own handwriting that Sultan Singh is the proprietor of the property. He also admits that, so far as entries of expenditure are concerned, they relate only to the expenditure of Sultan Singh. Another relates to the year 1902. It contains the accounts of the same villages with a statement in his own handwriting that Brijraj Singh is the proprietor and similarly the items of expenditure relate to him alone. These books demonstrate the falsity of the rest of his evidence. It is true that he produced collective account books for all the villages purporting to show that the property was enjoyed in common in spite of the partition. There are numerous discrepancies between these and the separate account books which he alleges were compiled from them, and he is wholly unable to account for these discrepancies or indeed for the existence of the separate account books at all. The learned Judge of first instance, who saw the witness and examined the books, came to the conclusion that these collective account books were not genuine, and their Lordships have no doubt that this conclusion was correct.

The claim of the plaintiffs in this action evidently arose from the suggestion of the pleaders whom they consulted after quarrels arose in the family, and was based on the fact that the document which evidences the partition is termed a will. It is obvious that such a partition could not have been made by Balwant Singh by will strictly so-called. But, as has been already pointed out, the document is much more than a will (if indeed it is in any sense a will at all), for it describes and witnesses to a family arrangement contemporaneously made and acted on by all parties. Everyone treated it as such at the time. The mutations of names show this beyond controversy. There is nothing, therefore, in the fact that the document is called a will which invalidates the partition, which was undoubtedly made in fact, and which was acted on by all parties for ten years without any dispute or misunderstanding as to their respective rights under it.

Counsel for the plaintiffs have endeavoured to support the contention that the partition was not intended to take effect *in praesenti* by reference to a provision to be found in this document. It reads as follows :

"If I at any time come back from pilgrimages and find mismanagement or character of any one bad, then I shall have power to cancel this Will, which shall be enforced from the date of its execution."

Their Lordships are of opinion that the highest effect that can be given to such words is that this evidences a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property, and viewed thus, the contractual acceptance of a power of forfeiture in case of bad behaviour would not, in their Lordships' opinion, be sufficient to prevent the partition operating *in praesenti*. But the true interpretation of the provision is probably that it was merely put in as a threat in order to keep the sons in good behaviour, and that it could not have been enforced specifically, or even at all. It is certainly quite insufficient to outweigh the overwhelming evidence that this was a family arrangement accepted by all parties.

The above considerations relate only to the village property. In addition to this there were two buildings, one in Aligarh and the other at Sahaoli. The disposition in the document relating to these buildings is peculiar and did not in the opinion of the learned Judge of first instance amount to an absolute disposition of them, and their Lordships are not prepared to differ from his views on this point.

There remains the movable property. As to this the family arrangement is absolutely silent. The plaintiffs are therefore entitled to their share of these movables as inherited property.

It will be seen therefore that their Lordships are of opinion that the judgment of the learned Judge of first instance was right on all points. Both plaintiffs and defendants appealed from his decision to the High Court. That Court allowed the plaintiffs' appeal and dismissed that of the defendants. The defendants appealed from both of these decisions. In their Lordships' opinion the High Court ought to have dismissed both appeals. They will accordingly humbly advise his Majesty that the order of the High Court allowing the plaintiffs' appeal should be discharged with costs, and the decree of the Subordinate Judge restored and that the order of the High Court dismissing the defendants' appeal should be affirmed. The plaintiffs must pay the costs of the defendants' appeal to His Majesty in Council,

P. O.

1918.

Brijraj Singh
 &
 Sheodan Singh.
 Lord Moulton.

P. O.

1918.

Brijraj Singh
v.
Sheodan Singh,
Lord Moulton.

and the defendants must pay the costs of their unsuccessful appeal.

Ranken Ford, Ford and Chester.—Solicitors for the Appellants.

Barrow Rogers and Nevill.—Solicitors for the Respondents.

J. M. P.

Appeal allowed in part.

PRESENT : *Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.*

CHIMAN LAL

v.

HARI CHAND.

P. O.

1913.

April, 8. 15.
May, 2.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

Hindu Law—Adoption—Married orphan, adoption of—Agarwal Banias of Zira in the Punjab—Custom.

Where the Courts below concurrently found that in matters of adoption the Agarwal Banias of Zira in the Punjab do not follow the general rules of the Hindu law but are governed by custom that amongst them an unequivocal declaration by the adopting father that a boy has been adopted and the subsequent treatment of that boy as the adopted son is sufficient to constitute a valid adoption and that the respondent, an orphan and a married man, had in fact been adopted according to that custom :

Held, that the concurrent findings must be confirmed, but that the present case owing to the limited nature of the evidence as to the custom would not be a satisfactory precedent if in any future instance fuller evidence regarding the alleged custom of the Agarwal Banias of Zira should be forthcoming. That such evidence was sufficient as between the parties to the present suit and those claiming through or under them.

Appeal from a final judgment and decree (April 6, 1908) passed by the Chief Court of the Punjab on review, affirming a judgment and decree of the Divisional Judge, Ferozepore, (October 14, 1904) which affirmed a judgment and decree of the District Judge, Ferozepore (March 23, 1903).

The question for determination was whether the plaintiff respondent Hari Chand was the adopted son of the defendant Jiwan Mal, who was represented in this appeal by the appellant Chiman Lal.

The facts of the case appear sufficiently from the judgment.

Sir Robert Finlay K. C., and *G. E. A. Ross K. C.*, for the Appellant : The adoption of a married orphan is invalid. The respondent, has not proved that there is a custom among the Agarwal Banias of Zira to adopt any one who is both an orphan and a married man. In *Lala Rup Chand v. Jambu Parshad* (1)

adoption of a married Agarwala Jain is upheld, but it is specially laid down that that case was not to make a precedent. The inference from the evidence is irresistible that the parties are governed by the Hindu law except in so far as it is varied by custom and the evidence fails to prove any custom that a person who is both an orphan and a married man can be adopted.

[LORD SHAW referred to *Sajjad Husain v. Wasir Ali Khan* (1) and section 596 of the Code of Civil Procedure, 1882 and observed that there were concurrent findings that the respondent was adopted according to the custom of the parties' caste.]

That rule does not apply. It is confined to cases where the findings are of pure facts, but has no application where there is a substantial question of law : *Karuppanan Servalai v. Srinivasan Chetti* (2). Whether there is any evidence to support the finding is a question of law and there is no evidence to support the finding. Again when the certificate is given, as it is here, under section 595 (c) of the Code, section 596 has no application. Reference was also made to section 70 (1) (b) of the Punjab Courts Act (XVIII of 1884) as amended by Act XXV of 1899 and Mayne on Hindu law and Usage, 7th ed. p. 56. The respondent was not in fact adopted.

DeGruyther K. C., (*O'Gorman with him*), for the Respondent : section 595 (c) is controlled by section 596 of the Code. The rule as to the concurrent findings is a rule of practice and binding on the Board irrespective of the certificate given by the High Court. The only question raised by the pleadings is that the respondent was never adopted and on that there are concurrent findings in favour of the latter. Reference was made to *Rup Chand v. Fambu Parshad* (3). Counsel was stopped.

Ross K. C., replied.

The judgment of their Lordships was delivered by

Sir John Edge.—The suit in which this appeal has arisen was brought on the 19th January 1901 in the Court of the District Judge of Ferozepore by Hari Chand, who is the respondent here, against Jiwan Mal, now dead, who is represented by Chiman Lal the appellant. In this suit Hari Chand sought a declaration that he was the adopted son of Jiwan Mal the then

P. O.

1912.

Chiman Lal

v.

Hari Chand.

May, 2.

(1) (1912) L. B. 89 I. A. 156 (161), I L. B. 34 All. 455, 16 O. L. J. 612.

(2) (1901) L. B. 29 I. A. 88, I. L. B. 25 Mad. 215.

(3) (1910) L. B. 37 I. A. 93, 11 O. L. J. 454, I L. B. 82 All. 247.

P. C.

1918.

Chiman Lal

v.
Hari Chand.

Sir John Edge.

defendant. In his written statement Jiwan Mal alleged that he had never adopted Hari Chand.

Hari Chand and Jiwan Mal were Hindus, and Agarwal Banias, of Zira, in the Punjab. Hari Chand was one of the four sons of Ghanu Mal, who was a brother of Jiwan Mal. Chiman Lal, the appellant here, was a son of Maya Mal, who was another brother of Jiwan Mal. At the time of the alleged adoption Hari Lal was an orphan and was married. No issue was framed by the District Judge as to whether the parties were governed by Hindu law or by custom, or as to the validity of the adoption if it, in fact, were made. The District Judge held that in the Punjab—

“Non-agricultural Hindus do not, in matters of adoption follow Hindu law, and there seems no reason to doubt that a declaration of adoption, together with treatment in accordance with the avowed intention, would be sufficient to establish the validity of an adoption, even though the position of the adopted son were inconsistent with the strict requirements of Hindu law.”

The District Judge found that Jiwan Mal had, in fact, adopted Hari Chand, and on the 23rd March 1903, gave the plaintiff a decree.

From the decree of the District Judge Jiwan Mal appealed to the Court of the Divisional Judge of Ferozepore. The Divisional Judge, on the 10th July 1903, remanded the suit to the Court of the District Judge to give the parties the opportunity of proving or disproving the validity of the adoption. On the return to the order of remand the Divisional Judge found, as a fact, that the parties were governed in cases of adoption by customary law, and that in the caste to which the parties belonged “a mere declaration to the effect that a boy has been adopted, and his subsequent treatment as a son is sufficient for all intents and purposes to make the adoption a valid one,” and further found on the evidence that Hari Chand had been adopted by Jiwan Mal as his son according to the custom prevailing among the Agarwal Banias of Zira. The Divisional Judge by his decree of the 14th October 1904 dismissed the appeal.

From the decree of the 14th October 1904 of the Divisional Judge Jiwan Mal appealed to the Chief Court of the Punjab. The learned Judges of the Chief Court on appeal carefully reviewed the evidence in case, and holding that Jiwan Mal had unequivocally designated Hari Chand as his heir and had treated him as his adopted son, found that the factum of adoption was proved. On the question of the validity of the adoption the learned Judges found that the Agarwal Banias of Zira did not follow

Hindu law in matters of adoption, and observed that "the really important thing is the unequivocal intention and treatment, and we find both proved here." The Chief Court by its decree dismissed the appeal.

From the decree of the Chief Court of the Punjab dismissing the appeal to that Court this appeal has been brought. In this appeal it has been contended on behalf of the appellant so far as is material, that Jiwan Mal did not in fact adopt Hari Chand as his son, and that the alleged adoption was invalid according to Hindu law. Their Lordships consider that the Chief Court and the Divisional Judge have concurrently found that among the Agarwal Banias of Zira the general rules of Hindu law as to adoptions do not apply, and that by the custom applicable to the Agarwal Banias of Zira an unequivocal declaration by the adopting father that a boy has been adopted and the subsequent treatment of that boy as the adopted son is sufficient to constitute a valid adoption; and that in fact Jiwan Mal did unequivocally adopt Hari Chand as his son and treated him as his adopted son. Of the fact of the adoption and treatment there was ample evidence upon which the Judges of the Chief Court and the Divisional Judge could find as they did. The evidence upon which it was found that the Agarwal Banias of Zira do not in matters of adoption follow the general rules of Hindu law, and that by the custom applicable to them an unequivocal declaration of adoption followed by subsequent treatment of the person as an adopted son is sufficient to constitute a valid adoption, appears to their Lordships to have been somewhat limited, but their Lordships consider that as between the parties to this suit and to this appeal, and those claiming through or under them that evidence was sufficient to entitle the Chief Court and the Divisional Judge to find that the adoption was valid. Their Lordships, however, consider that the present case, owing to the limited nature of the evidence as to custom among the Agarwal Banias of Zira, would not be a satisfactory precedent if in any future instance among other parties fuller evidence regarding the alleged custom of the Agarwal Banias of Zira should be forthcoming. The contention that Chiman Lal had also been adopted by Jiwan Mal is not established by the evidence before this Board.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed and that the decree of the Chief

P. O.

1913.

Chiman Lal

c.

Hari Chand.

Sir John Edge.

P. O.

1918.

Chiman Lal

v.
Hari Ohand.

Sir John Edge.

Court of the Punjab should be affirmed. Chiman Lal, the appellant must pay the costs of this appeal.

Hartcap & Davis.—Solicitors for the Appellant.

T. L. Wilson & Co.—Solicitors for the Respondent.

J. M. P.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice Beachcroft.

GOBIND MANDAR

v.

BANARSI PROSAD.*

CIVIL,

1918,

February, 28.

Rent, suit for—Agreement, registered—Agreement to convert after expiry of lease, money rent into rent in kind, if an enhancement and enforceable—Bengal Tenancy Act (VIII of 1885). Secs. 29, 43.

The conversion of cash rent into rent in kind cannot be regarded as enhancement within the meaning of section 29 or section 43 of the Bengal Tenancy Act.

Hassan Kuli Khan v. Nahokhodi (1) followed.

Where it was agreed that if the tenant should continue in occupation after the expiry of the term of the lease, he would pay rent in kind :

Hold, that the agreement was not objectionable and could be enforced.

Ganpat v. Jasodhar (2) referred to.

Tefandro Narain v. Bahai Singh (3) distinguished.

Appeal by the Defendant.

Suit for recovery of arrears of rent.

The material facts and arguments appear from the judgment.

Babus Bepin Behary Ghose (for Babu Umakali Mukerji) and *Khetra Mohon Sen* for the Appellant.

Mr. Sinha, Babus Narendra Chandra Bose and Gurudas Sinha for the Respondent.

The judgment of the Court was delivered by

February 28.

Mookerjee J.—This is an appeal on behalf of the defendant in a suit for recovery of arrears of rent. The sole question in controversy is, whether the covenant for payment of rent in the registered lease of the 5th May, 1902 by which the tenancy was created is or is not enforceable. The clause in question provided that if the tenant were to continue in occupation of the

* Appeals from Appellate Decrees Nos. 214, 215, 405 to 409 of 1911, against the decrees of J. C. Twidell, Esq., District Judge of Bhagalpur, dated the 12th November, 1910, affirming those of Babu Ram Lal Dutt, Subordinate Judge of Bhagalpur, dated the 29th April, 1910.

(1) (1908) I. L. B. 38 Calo. 200.

(2) (1895) 17 C. L. J. 520. (3) (1895) I. L. B. 23 Calo. 658.

land after the expiry of the term, that is, the period of five years during which he had agreed to pay cash rent at a specified rate, he would pay rent in kind under the *bhowli* system, that is, divide the crops equally with the landlord.

It has been argued, in the first place, that this is a provision for enhancement of rent in contravention of the provisions of section 43 of the Bengal Tenancy Act, which provides that the rent of a non-occupancy raiyat shall not be enhanced except by a registered instrument. This contention is clearly fallacious, for, even if it be assumed that the provision for payment of rent in kind embodied an agreement for enhancement of rent, it was contained in a registered instrument. Section 43 consequently is no bar. But it is also plain that this is not a provision for enhancement of rent, because, as explained in the case of *Hassan Kuli Khan v. Nakchhedi Nomia* (1), enhancement of rent under the Bengal Tenancy Act means the increase of rent in amount without alteration in kind. The conversion of cash rent into rent in kind cannot consequently be regarded as enhancement within the meaning of section 29 or section 43. The first ground, therefore, fails.

It has been argued, in the second place, that the provision in question was in the nature of a penalty and reference has been made in support of this view to the case of *Tajendro Narain Singh v. Bakai Singh* (2). In that case, there was an agreement that if a fresh *kabulyat* was not executed by the tenant, rent would become payable by him at an enhanced rate. It was ruled by this Court that this provision was in the nature of a penalty, that is, intended not to be enforced but only to be used as a threat to compel the tenant to execute the *kabulyat*. In the case before us, it was agreed that if the tenant should continue in occupation after the expiry of the term of the lease, he would pay rent in kind. This agreement is in no way objectionable and must be enforced. The view we take is in accord with that adopted in *Ganpat Singh v. Yasodhur Singh* (3), where it was held that an agreement by the tenant that if he held over upon the expiry of the term, he would pay rent at a higher rate than he did during the term, was valid and enforceable. The second ground cannot, consequently, be sustained.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

It is conceded that this judgment will govern the other appeals 215, 405 to 409 of 1911 which are therefore also dismissed with costs.

A. T. M.

Appeals dismissed.

(1) (1908) I L. B. 88 Calo. 200.

(2) (1895) I L. B. 22 Calo. 658.

(3) (1895) 17 O. L. J. 593.

CIVIL.

1912.

Gobind Mandar

vs.
Banarsi Prasad.

Mookerjee, J.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

W. M. GRANT

v.

HARSAHAI SINGH.*

CIVIL

1918.

March, 14.

Raiyat holding at fixed rate—Presumption—Bengal Tenancy Act (VIII of 1885), Secs 50 (2), 106—Unexplained variation—Alteration in rate of rent, if variation—Record of rights, entry in.

An entry in the record of rights is presumed to be correct till the contrary is shown.

Where the tenants have established that since 1882 they have been in occupation of certain quantity of land and have paid rent for the same at a certain rate, the statutory presumption mentioned in sub-section (2) of section 50 of the Bengal Tenancy Act arises. An unexplained small variation is not sufficient to rebut the presumption.

Huro Nath v. Anwer Biswas (1) and *Anundoll v. James Hills* (2) referred to.

A mere alteration in the rate of rent will not prove a variation unless it be shown that the tenant submitted to that varied and enhanced rate.

Gopal v. Nobho Kishen (3) referred to.

Appeal by the Plaintiff.

Suit for a declaration that the defendants were not raiyats at fixed rates of rent.

In 1864, the tenants held 36 bighas 19 cottahs at a rent of Rs. 92-6 as.; in 1865, 38 bighas 10 cottahs at Rs. 94-11-5; in 1868, 39 bighas, at Rs. 95-6-9 p.; in 1874, 38 bighas 10 cottahs at Rs. 94-10-9 p.; in 1875, 41 bighas 10 cottahs, at Rs. 97-10-9 p.; and in 1878, 43 bighas, at Rs. 101-5-9 p. The tenants defendants were entered in the record of rights as raiyats holding at a fixed rate of rent. The area in their occupation was stated to be 43 bighas, and the rent payable in respect thereof, Rs. 101-6-9 p. The plaintiffs therefore brought a suit under section 106 of the Bengal Tenancy Act for a declaration that the defendants were not raiyats at fixed rates of rent. The Courts below dismissed the suit.

Babus Umakali Mukerji and Sailendra Nath Palit for the Appellant.

Babu Khetra Mohon Sen for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal on behalf of the plaintiffs

March, 14.

* Appeal from Appellate Decree No. 1476 of 1911, against the decree of J. O. Twidell, Esq., District Judge of Bhagalpur, dated the 30th January, 1911, affirming that of Maulvi Shamsuddin Hyder, Assistant Settlement Officer of Barn, dated the 8th August, 1910.

(1) (1884) 1 W. B. 280.

(2) (1885) 4 W. B. Act X. 88.

(3) (1866) 3 W. B. Act X. 88.

in a suit under section 106 of the Bengal Tenancy Act. The defendants have been entered in the record of rights as raiyats holding at a fixed rate of rent. The area in their occupation is stated to be 43 bighas, and the rent payable in respect thereof, Rs. 101-6-9 pies. The plaintiffs ask for a declaration that the defendants are not raiyats at a fixed rate of rent.

In the first place, it is plain that the entry in the record of rights must be presumed to be correct till the contrary is shewn. In the second place, the defendants have established that since 1882 they have been in occupation of 43 bighas of land and have paid rent for the same at the rate of Rs. 101 6 as. 9 pies a year. Consequently the statutory presumption mentioned in sub-section 2 of section 50 of the Bengal Tenancy Act arises. That sub-section provides that if it is proved in any suit "or other proceeding under this Act that either a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shewn, that they have held at that rent or rate of rent from the time of the permanent settlement." The question in controversy is, whether the landlords have shewn the contrary within the meaning of this sub-section. The landlords have, for this purpose, produced their collection papers. These papers show that in 1864 the tenants held 36 bighas 19 cottahs at a rent of Rs. 92-6 as.; in 1865, 38 bighas 10 cottahs at Rs. 94-11-5; in 1868, 39 bighas, at Rs. 95-6-9 pies; in 1874, 38 bighas 10 cottas, at Rs. 94-10-9 pies; in 1875, 41 bighas 10 cottahs, at Rs. 97-10-9 pies; and in 1878, 43 bighas, at Rs. 101-5-9 pies. It has been argued on behalf of the landlords that these figures show that the defendants have not held at a rent or rate of rent which has been uniform from the time of the Permanent Settlement. In our opinion, this contention cannot be supported.

It was pointed out by this Court in the case of *Huro Nath Roy v. Ameer Biswas* (1), that a small variation which was unexplained was not sufficient to rebut the presumption which arose under section 4 of the Bengal Rent Act of 1859. It was similarly observed in the case of *Anundoll Chowdry v. James Hills* (2), that an unexplained variation of one rupee in a total *jama* of Rs. 60 was not a material variation, so as to deprive the tenant of the benefit of the presumption of uniform payment from the time of the Permanent Settlement. In the case before us, no

CIVIL.

1918.

W. M. Grant

v.

Harsahal Singh.

Mookerjee, J.

(1) (1884) 1 W. R. 230.

(2) (1885) 4 W. R. Act X. 83.

CIVIL

1918.

W. M. Grant

v.

Harnahal Singh.

Mookerjee, J.

doubt, there is a small variation in the rent ; but at the same time, there is a variation in the area as well ; consequently, the inference may legitimately be drawn, as, indeed, has been done by the District Judge, that the variation in the rent was due to variation in the area. This view does not militate against the decision in *Bissassur Chuckerbutty v. Wooma Churn Roy* (1). In that case, there was a variation of the rent from Rs. 11-13 to Rs. 13-4-0 and it was argued on the authority of the decision in *Anundoll Chowdry v. James Hills* (2), that the statutory presumption had not been rebutted ; but this contention was over-ruled, because it was established that the rent had been enhanced on the occasion of a transfer of the holding. In the case before us, there are no circumstances to support a possible hypothesis that the tenants did at any time submit to an enhancement of their rent : *Gopal Mundul v. Nobbo Kishen* (3). On the other hand, the small variation in the rent has been sufficiently explained by a very nearly corresponding variation in the area. The presumption under sub-section 2 section 50 of the Bengal Tenancy Act cannot consequently be deemed to have been rebutted.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1867) 7 W. B. 44.

(2) (1885) 4 W. B. Act X. 83.

(3) (1886) 5 W. B. Act X. 88.

Before Mr. Justice Chitty and Mr. Justice Taunton.

SHIB SHARAN SHA

v.

JANAKI NATH DEY AND OTHERS.*

CIVIL

1918.

February, 5.

Civil Procedure Code (Act V of 1908), Sec. 2, cl. (2)—Decree—Preliminary issues, decision on—Decree, whether includes such a decision—Appeal.

Where a number of issues was raised in a suit, and two issues were first taken up by the Court of first instance as issues in bar and were also decided in favour of the plaintiff, the other issues being left off to be proceeded with on a later date, and an appeal was preferred from the decision of those two preliminary issues :

Held, that no appeal lay inasmuch as there was no decree from which an appeal could lie.

* Appeal from Appellate Decree, No. 1782 of 1910, against the decision of H. W. Soroopie, Esq., District Judge of Santhal Parganas, dated the 29th March, 1910, setting aside a decision of Mr. A. McGavin, Subordinate Judge of Deoghar, dated the 18th September, 1909.

Appeal by the plaintiff, Shib Sharan Sha.

The plaintiff brought a suit against the defendants Janaki Nath Dey and others, for recovery of possession of certain lands on a declaration of the plaintiff's title thereto. The plaintiff's case was that he purchased the lands in suit, which were part and parcel of *malrayati jote* of village Rautdih at a Court sale, but failed to obtain possession thereof; and he further alleged that the lands were fraudulently entered in the respective defendant's names at the last settlement as *raiyati jotes*.

Defendants contended *inter alia* that the plaintiff had no title to the lands in suit, that the suit was barred by limitation under section 25 of Regulation III of 1872, and that the order passed in previous execution proceedings having remained final between the parties, the suit was barred by the principle of *res judicata*.

It appears that several issues were framed in the suit, and the Subordinate Judge took up first the two issues in bar, *vis.*, whether the suit was barred by limitation or by the principle of *res judicata*, and holding that the suit was not barred either by limitation or by the principle of *res judicata* decided those two issues on the 13th September, 1909. He further directed that the case would proceed as regards the other issues on the 4th October, 1909. Against the order of the Subordinate Judge deciding the two issues in favour of the plaintiff, the defendants appealed to the District Judge. The learned District Judge holding that the suit was barred by limitation and that it was unnecessary to discuss the issue whether or not the principle of *res judicata* applied, reversed the decision of the first Court, and dismissed the suit.

Against that decision the plaintiff appealed to the High Court.

Babu Dwarka Nath Chuckerbutty (with him *Babu Khetra Mohon Sen*) for the Appellant. No appeal lay to the District Judge, and as such the order passed by him was illegal. There was no decree passed by the Subordinate Judge from which an appeal could lie. If the law provided for such an appeal there might be as many appeals in every suit as there were issues. The suit has not in any way been finally decided and it should be allowed to continue.

Babu Mohendra Nath Roy (with him *Babu Anilendra Nath Roy Chowdhury*) for the Respondents. The order passed by the Subordinate Judge on the two preliminary issues in the case

CIVIL.

1918.

Shib Sharan

v.
Janaki Nath.

CIVIL.

1913.

Shib Sharan

v.
Janaki Nath.

was a decree within the meaning of section 2, cl. (2) of the Code of Civil Procedure (Act V of 1908), and as such an appeal lay to the higher Court. The definition of "decree" under the new Code is different from that under the old Code (Act XIV of 1882). Under the present section "decree" includes the determination of "the rights of the parties with regard to all or any of the matters in controversy in the suit," and thus it covers a decision on the questions of limitation and *res judicata*, against which the appeal was preferred to the lower appellate Court. In support of my contention, I rely on an unreported case (Mis. App. No. 347 of 1911, decided on 21st May, 1912, by Brett and Sharfuddin JJ.), where an appeal was held to lie from a preliminary order like the present one. The same principle also applies here.

The judgment of the Court was delivered by

February, 5.

Chitty J.—A number of issues were raised in the suit out of which this appeal arises. Issues Nos. 5 and 6 dealt with the points whether the suit was barred by limitation or by the principle of *res judicata*. Those two issues were first taken up as issues in bar, discussed by the Subordinate Judge, and decided in favour of the plaintiff. The Subordinate Judge very properly ordered that the case should then proceed as regards the other issues on a given date. Against the decision of the Subordinate Judge, on the two preliminary issues an appeal was preferred by the defendants to the District Judge. An objection was taken before the District Judge that there was no decree from which an appeal could lie.

The District Judge, however, came to the conclusion that there was a decree within the meaning of section 2 (2) of the Civil Procedure Code. We can only say that, in our opinion, this view of the District Judge was clearly erroneous. If such a contention could prevail, there might be as many appeals in every suit as there are issues. The suit has not, in any way, been finally decided and it should be allowed to continue. We accordingly set aside the decree of the District Judge and remand the case to the Court of first instance to proceed with the hearing of the suit from the point at which it left off. The plaintiff appellants will have his costs of this appeal.

Let the memorandum of appeal be corrected by putting the names of the parties in the proper category.

A. N. R. C.

Appeal allowed: case remanded.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

MRITYUNJOY BHATTACHARJEE

v.

BHOLA NATH DUTT.*

*Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III Art. 6—Co-sharer
landlord—Several holdings—Decree for share of rent, execution of.*

Article 6 of Schedule III of the Bengal Tenancy Act is applicable where the decree has been made in a suit between a landlord and a tenant to whom (and not to which), the provisions of the Act are applicable. It is immaterial that all the provisions of the Act are not applicable to the suit.

Where a decree was obtained by one of several joint landlords for his share of the entire rent and was made in a suit in which rent was claimed in respect of several holdings in the occupation of the tenant, an application for execution was held to be governed by Article 6 of Schedule III of the Bengal Tenancy Act.

Thakurani Dasi v. Mohendra Nath Dey (1) followed.

K. B. Dutt v. Gortha Behary Bhuiya (2) doubted and not followed.

Appeal by the Decree-holder.

Application for execution of a decree obtained on the 12th August, 1902. The decree was obtained by one of several joint landlords for his share of the entire rent and was made in a suit in which rent was claimed in respect of several holdings in the occupation of the tenant. After intermediate applications in 1905 and 1908, the present application was made on the 9th January 1912. The Courts below dismissed the application on the ground that it was barred under Article 6 of Schedule III of the Bengal Tenancy Act. An appeal was preferred to the High Court, which was heard under Order XLI, Rule 11 of the Code of Civil Procedure.

Babu Jadu Nath Mandal for the Appellant.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the decree-holder against an order by which the Court below has refused execution of a decree. The decree now sought to be executed was obtained on the 12th August 1902. After intermediate applications in 1905 and 1908, the present application was made on the 9th January 1912. The question in controversy is, whether the application is barred under Article 6 of Schedule III of the

* Appeal from Appellate Order No. 98 of 1912, against the decision of M. Yusuf Esq., District Judge of Burdwan, dated the 26th August, 1912, affirming that of Babu Narendra Nath Ghose, Munsiff of Burdwan, dated the 15th May, 1912.

(1) (1909) 10 C. L. J. 463. (2) (1912) 16 P. W. N. 1006.

CIVIL

1912.

April, 14.

April, 14.

CIVIL

1918.

Mrityunjoy

Bhola Nath.

Mookerjee, J.

Bengal Tenancy Act. On behalf of the decree-holder, it has been contended that the Article is not applicable, because the decree is for money and is not a decree for rent within the meaning of the Bengal Tenancy Act. It has been pointed out that the decree was obtained by one of several joint landlords for his share of the entire rent and was made in a suit in which rent was claimed in respect of several holdings in the occupation of the tenant. It has been argued that each of these circumstances makes the decree a decree for money. This need not be disputed; but the circumstances mentioned are, in our opinion, immaterial and Article 6 of Schedule III of the Bengal Tenancy Act is applicable to the present application for execution. That Article provides that an application for execution of a decree made under the Bengal Tenancy Act or any Act repealed by that Act, in a suit between the landlord and the tenant to whom the provisions of the Act are applicable, and not being a decree for a sum of money exceeding Rs. 500, shall be made within three years of the date of the decree. Reliance has been placed upon the case of *K. B. Dutt v. Gostha Behary Bhuiya* (1), in support of the contention that a decree for rent obtained by a co-sharer landlord in a suit not brought under section 148 A of the Bengal Tenancy Act is a money decree and the special law of limitation applicable to rent decrees does not apply. We are not prepared to accept the rule recognised in *K. B. Dutt v. Gostha Behary* (1) as well-founded on principle, and we prefer the view taken in the case of *Thakamani Dasi v. Mohendra Nath Dey* (2). The decision in *K. B. Dutt v. Gostha Behary Bhuiya* (1), which was doubted in *Rhetra Mohan v. Mohim Chandra* (3), overlooks the fundamental fact that Article 6 is applicable where the decree has been made in a suit between a landlord and a tenant *to whom* (and not "*to which*") the provisions of the Act are applicable. The vital point to determine, consequently, is, whether the provisions of the Act are applicable to the landlord and tenant between whom this suit has been instituted; it is immaterial that all the provisions of the Act are not applicable to the suit. We must, therefore, hold that the rule laid down in *Thakamani Dasi v. Mohendra Nath Dey* (2) governs the case before us.

The result is that the order of the Court below is affirmed and the appeal dismissed.

A. T. M.

Appeal dismissed under O. 41 R. 11 C. P. C.

(1) (1912) 16 C. W. N. 1006.

(2) (1909) 10 C. L. J. 468.

(3) (1918) 17 C. W. N. 518.

Before Mr. Justice Chitty and Mr. Justice Tannon.

KUMAR KALANAND SINGH AND ANOTHER.

v.

EASTERN MORTGAGE AGENCY LD. CO. AND OTHERS.*

Abwab—Landlord, if can realise, on a particular potta accounted before the passing of the Bengal Tenancy Act—Selami and Tehwar—Part of rent—Regulation V of 1812, Sec. 3—'Definite clause in the engagement contracted between parties.'

If a particular sum specified in the lease or agreed to be paid is the lawful consideration for the use and occupation of the land, that is to say, if it is really part of the rent, although not described as such, the landlord would be entitled to recover the same and the whole question in the case is whether the items claimed are really part of the rent, which was the consideration for the letting out of the land.

Jotindra v. Chandra Nath (1) and *Aparna v. Karam Ali* (2) followed.

Where a permanent tenure was created by a lease dated 31st January, 1874 and in this lease it was specifically provided and agreed that the lessee should pay to the lessor year by year a fixed sum of Rs. 4,310, of which the sum of Rs. 4300 was described as *jama*, Rs. 5 as *selami toaji* and Rs. 5 as *tekwari dasakra* :

Held, that the stipulation for the payment of *selami* and *tekwari* was not a stipulation or reservation for the payment of arbitrary or indefinite sums but in the language of section 3 of Regulation V of 1812 was "a definite clause in the engagement contracted between the parties" which should be "maintained and given effect to."

Mukhdari Singh v. Chulhan Mahlon (3) and *Radha Prasad Singh v. Bai Kowar Kowri* (4) distinguished.

Appeal by the Plaintiffs.

Suit to recover Rs. 4,976-8-6 p. as the *mokarari* rent for the year 1312 and part of 1313 with cesses, interest, *selami* and *tekwari* under the terms of the *potta* and *kabuliat*.

The material facts appear from the judgment.

Babus Umakali Mukherji and *Sailendra Nath Pulit* for the Appellants.

Babus Hemendra Nath Sen, *Upendra Gopal Mitter* and *Sib Chandra Pulit* for the Respondents.

The judgment of the Court was as follows : C. A. v.

This is an appeal by the plaintiffs and arises out of a suit brought by them to recover from the defendants 1st and 2nd parties Rs. 4,976-8-6 as the *mokarari* rent of a 7 as. 3 p.

* Appeal from Original Decree No. 59 of 1908, against the decree of Babu Bajendra Nath Dutt, 1st Subordinate Judge of Bhagalpur, dated the 29th August, 1907.

(1) (1902) 6 O. W. N. 340.

(2) (1906) 4 O. L. J. 527, (sub-nomine *Aparna v. Karam Ali*, 10 O. W. N. 527).

(3) (1889) I. E. R. 17 Calo. 151. (4) (1890) I. L. R. 17 Calo. 726.

CIVIL.

1912.

February, 5, 20.
March, 10.

March, 10.

CIVIL.

1918.

Kalanand Singh

v.

Eastern Mortgage
Agency Ltd. Co.

share for the year 1312 and part of 1313 with cesses, interest, *selami* and *tehwari* under the terms of the *potta* and *kabuliat*, and a further sum of Rs. 292-8 as mutation fee at the rate of 15 per cent. on the annual *mokarari* rent.

The only questions arising on this appeal are (1) whether the claim for the mutation fee is barred by limitation and (2) whether the claim for *selami* and *tehwari* is legal and (3) whether interest on the claim decreed should have been allowed *pendente lite*. So far as the claim for the mutation fee is concerned there is no question that it is barred. It should be stated that before us the claim has been restricted to so much of the fee as would be due on the 6as. share in the *mokarari*, the plaintiffs conceding that as regards the 1a. 3p. share it is not recoverable.

As to the 6as. share the mutation fee was admittedly recoverable in 1898 when this share was transferred. At that time the present plaintiffs were entitled to only 9as. out of the 6as. The other 7as. was then vested in their co-sharer, and has only come to them by lease at a subsequent date *viz*: 25th March 1904. It is obvious therefore that as regards the 7as. share of the 6as. estate time had commenced to run against the plaintiff's predecessor in title in 1898 and the fact of one of the plaintiffs being a minor at the date of the lease would not avail to stop it.

As regards the 9as. share of the 6as. estate the plaintiffs attained majority in September 1901 and September 1904 respectively. The present suit was filed on 11th June 1906. It is conceded that on attaining his majority plaintiff No. 1 became the *karta* of the family. He could therefore have given a valid discharge for the amount of the mutation fee if paid. The provisions of sections 7 and 8 of the Limitation Act 1877 can not therefore avail the plaintiffs in the present case. Assuming the period of limitation to be 6 years under Article 120 of Schedule II it follows that the suit was not filed within 6 years from the date when the right to sue accrued nor within 3 years from the date when plaintiff No. 1 attained his majority. The suit, therefore, as regards this item of the claim is clearly barred and the plaintiffs' appeal must fail. With regard to the claim for the items designated "*selami towji*" and "*tehwari dasakra*" the plaintiffs appellants rely upon the provisions of section 3 of Regulation V of 1812, and the decisions of this Court in the case of *Pudmanund Singh v. Baij Nath* (1) while the defendants

respondent contend that the case just cited has been overruled by the decisions of the Judicial Committee of the Privy Council in *Tilukhdari Singh v. Chulhan Makton* (1) and of a Full Bench of this Court in *Radha Prosad Singh v. Bal Kowar Kosri* (2).

But in the cases of *Chulhan Makton* (1) and *Radha Prosad Singh* (2) the facts were wholly different from the facts in the present case. In those cases there were no written engagements and the sums claimed represented impositions or demands made upon the raiyat defendants at various times subsequently to the creation of their tenancies and the settlement of their rents. It was, therefore, held, and, no doubt, properly held, that though in accordance with practice or custom the tenants had paid these impositions for a long period, yet by virtue of the provisions of sections 54, 55 and 61 of Regulation VIII of 1793 they were not legally recoverable.

In the present case the permanent tenure now in question was created by a lease dated 31st January 1874 and in this lease it is specifically provided and agreed that the lessee shall pay to the lessor year by year a fixed sum of Rs. 4,310 of which the sum of Rs. 4,300 is described as *jama*, Rs. 5 as "*selami towji*" and Rs. 5 as "*tehwari dasakra*." Now no doubt if the lease had provided for an annual payment of only Rs. 4,300 and the landlord had at some subsequent date demanded from his tenant a further sum or sums by way of "*selami*" and "*tehwari*" such additional demands even if for some time acquiesced in would still be properly regarded as "*abwabs*" or "illegal cesses" not recoverable in law. But where (as in the present case) the payment of these specific sums is provided for and agreed upon in the lease creating the tenancy the stipulation for such payment is not in our opinion a stipulation or reservation for the payment of arbitrary or indefinite cesses but in the language of section 3 of Regulation V of 1812 is "a definite clause in the engagement contracted between the parties" which should be "maintained and given effect to." In fact the two sums now in question though not described in the lease as rent are in reality part of the consideration for which the tenancy was created and part of the rent agreed to be paid.

No doubt in the Full Bench case of *Radha Prosad Singh v. Bal Kowar Kosri* (2) some of the Judges expressed the opinion that the case of *Pudmanund v. Baij Nath* (3) had been wrongly decided but that was not the question referred to the Full

CIVIL

1918.

Kalanand Singh

Eastern Mortgage
Agency Ltd. Co.

(1) (1889) J. L. R. 17 Calo. 181.

(2) (1890) I. L. R. 17 Calo. 723.

(3) (1888) I. L. R. 15 Calo. 823.

CIVIL.

1918.

Kalanand Singh
v.
Eastern Mortgage
Agency Ltd. Co.

Bench, and as we have already shown the case then before the Full Bench, and the Privy Council case of *Tilukhdari v. Chulhan Makton* (1) upon which the learned Judges relied were decided upon facts wholly different from those in the case now before us. The decisions therefore in those cases do not govern the present case. All the cases cited appear to agree in this that a charge which is shown not to be an *abwab* but in reality part of the rent is recoverable. See *Jotindra Mohan Tagore v. Chandra Nath Safui* (2) and *Apurna Churn Ghose v. Kasam Ali* (3) where the learned Judges remark "If a particular sum specified in the lease or agreed to be paid is the lawful consideration for the use and occupation of the land, that is to say, if it is really part of the rent, although not described as such the landlord would be entitled to recover the same and the whole question in this case is whether the items claimed are really part of the rent, which was the consideration for the letting out of the lands to the defendant." That is precisely the case here and we are of opinion that these charges are recoverable for that reason that they were really part of the consideration for the letting.

With regard to the third point we are of opinion that in refusing interest *pendente lite* the Sub-judge did not exercise a sound judicial discretion. On the portion of the claim decreed, we allow interest *pendente lite* at the rate of 6 per cent per annum. The appeal is, therefore, decreed in part. We make no order as to costs.

A. T. M.

Appeal allowed in part.

- (1) (1899) I L R. 17 Calo, 181 (2) (1902) 6 O. W. N. 860.
(3) (1908) 10 O. W. N. 527; 4 O. L. J. 527.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice,
and Sir Asutosh Mookerjee, Knight, Judge.*

BASANTO KUMARI

v.

NANDA RAM KAIBARTO DASS AND OTHERS.*

CIVIL.

1918.

May, 30.

Limitation—Bengal Tenancy Act (VIII of 1885), Sec. III, Art. 3—Construction of dispossession—Dispossession by person not landlord—Landlord favouring dispossession.

Under Article 8, Schedule III of the Bengal Tenancy Act, there must be

* Letters Patent Appeal No. 44 of 1911, against the judgment of Hon'ble Mr. Justice Coxe, dated the 16th February 1911, in Appeal from Appellate Decree No. 494 of 1909, against the decree of W. B. Coote, Esq., Additional District Judge of Tipperah, dated the 18th December 1908, reversing that of Babu Narendran Kumar Bose, Officiating Munsiff of Kasba, dated the 8th April 1908.

dispossession by the landlord. The landlord's simply favouring the dispossession does not come within that Article.

Appeal by the Plaintiff.

Suit for ejectment.

CIVIL.

1918.

Basant Kumar

v.

Nanda Ram.

The principal defendants were brought on the land to assist in its cultivation by the plaintiff, a young and an inexperienced widow. The defendants compelled the young widow to take shelter at the house of a cousin. The first Court decreed the suit, but the lower appellate Court dismissed the suit on the ground of limitation under Article 3 Schedule III of the Bengal Tenancy Act, as there was a dispossession in which the landlord had a hand. The judgment of the lower appellate Court was affirmed by Mr. Justice Coxe by the following judgment.

Coxe J.—This suit was dismissed on appeal by the learned District Judge of Tipperah on the ground that it was barred by the rule of limitation laid down in Schedule III to the Bengal Tenancy Act. The decision of the learned District Judge being clearly in accordance with the pleadings in the case, the appeal was admitted only on the 4th ground stated in the memorandum of appeal namely that the special law of limitation laid down in the Tenancy Act could not be made applicable to the huts belonging to the plaintiff.

The learned vakil for the respondent consents that the appellants shall be allowed to remove these huts and does not press for costs. That being so, it is unnecessary to proceed further with this appeal. The plaintiffs will be entitled to remove their huts within a period of six weeks from the date of the arrival of record in the court of first instance. Otherwise the appeal will stand dismissed. The parties will bear their own costs in this Court.

The plaintiff then appealed under section 15 of the Letters Patent.

Babu Sasadhar Roy for the Appellant.

Babus Dwarka Nath Chakrabarti and Birendra Chandra Das for Respondents.

The judgments of the Court were as follows :

Jenkins C. J.—This is an appeal which arises out of a suit brought for recovery of possession of a holding governed by the Bengal Tenancy Act. The Munsiff decided in the plaintiff's

1911.
February, 16.

May, 30.

CIVIL.

1918.

Básmto Kumár

v.
Manda Ram.

Jenkins, C. J.

favour, but the District Judge reversed that decree on the ground that the special law of limitation afforded an answer to the plaintiff's claim. That decree has been confirmed by Mr. Justice Coxe: from his judgment the present Letters Patent Appeal is preferred. On her husband's death the holding vested in the plaintiff. She was at the time young and inexperienced, and her deceased husband's aunt came to live with her. The aunt brought the principal defendant's on to the land to assist in its cultivation. The defendant's who came on the land as licensees requited this by conduct which compelled the young widow to take shelter at the house of a cousin, and it is only in that sense that it can be said that there has been a dispossession. But on those facts coupled with a statement in her plaint which suggests collusion on the part of the landlord, the lower Court of appeal has held that there has been dispossession in which the landlord had a hand, and that the suit is barred by two years limitation.

This theory of constructive dispossession by landlords has been carried too far, and we are not disposed to encourage the idea that, because it can be said that the landlord has favoured the dispossession by others, there has been a dispossession by him, for that is what is required to bring into play Article 3 in the third schedule to the Bengal Tenancy Act. The Act is one to amend and consolidate certain enactments relating to the law of landlord and tenant, and its preamble shows that this was its purpose. It is as a part of that scheme that section 184 prescribes the special law of limitation embodied in Article 3 in Schedule III which provided that in a suit for possession of land claimed by the plaintiff as a raiyat or an under-raiyat, the period of limitation is two years from the date of dispossession. * As between the plaintiff and the principal defendants, there was no relationship of landlord and tenant, so that as between them the Article would not apply, and it is only by importing the landlord and saying that he had a hand in the ouster that any suggestion can be made that this rule of special limitation governs this case. But in fact there has been no dispossession by the landlord, so it cannot fairly be said that this is a suit that falls within Article 3. I, therefore, hold that this special plea of limitation fails.

It has been suggested that there are other matters which prevent us from now passing a decree in the plaintiff's favour, but I am unable to perceive anything that can afford any answer to a just claim met by an unjust defence. The defendants have

given no evidence : the case made by the plaintiff in her evidence is plain and convincing. I see no reason therefore for protracting this litigation and retarding the relief to which the plaintiff is entitled.

I think, therefore, that we should reverse the judgment of Mr. Justice Coxe, set aside the decree of the District Judge and restore the decree of the Munsiff with costs throughout.

Mookerjee J.—I agree.

A. T. M.

Appeal allowed.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice,
and Sir Asutosh Mookerjee, Knight, Judge.*

RUDRA NARAIN MAITI

v.

NATOBAR JANA.*

Limitation—Bengal Tenancy Act (VII of 1885), Sec. III, Art 3—Dispossession.

Under Article 3, Schedule III of the Bengal Tenancy Act, it must be clearly made out that any particular case falls within its terms. In each case, it has to be seen whether in fact, there has been such dispossession as the Article requires. That dispossession must be by the landlord.

Srimant Roy v. Mahaduo Mahata (1) followed.

Maharaj Bahadur Singh v. Forbes (2) commented on.

Appeal by the Plaintiff.

Suit for ejectment.

In execution of a decree obtained by an *ijaradar* after the extinction of the *ijara* lease against M, the plaintiff purchased the holding in dispute in 1890. Many years after that, another suit was brought for rent against M and the property was purchased in execution sale by the defendant No. 1. The plaintiff's case was that this second decree and sale were fraudulent and that he was all along the tenant of the land which he had sublet to the defendant No. 3, that he brought a suit against defendant No. 3 for rent in which defendant No. 3 repudiated the relationship of landlord and tenant and the suit was therefore dismissed. Defendant No. 3 claimed to hold the land as a sub-tenant under defendant No. 1. Defendant No. 2 was the *gomasta* of the landlord in collusion with whom the decree in the second suit mentioned above was said to have been

* Letters Patent Appeal No. 29 of 1911 under section 15 of the Letters Patent from a decision of Hon'ble Mr. Justice Coxe in Appeal from Appellate Decree No. 2597 of 1909 against the decree of Babu Ambica Charan Mookerji, Subordinate Judge of Midnapur, dated the 24th August, 1909, reversing that of Babu Asutosh Gupta, Munsiff, Contai, dated the 3rd February, 1909.

(1) (1904) I. L. R. 31 Calo. 550. (2) (1908) I L. R. 35 Calo. 737, 7 C. L. J. 652.

CIVIL.

1918.

Basanto Kumar

v.

Nanda Ram.

Jenkins, O. J.

CIVIL.

1918.

June, 11.

CIVIL.

1908

Madra Narain
v.
Natobar Jana.

obtained. The plaintiff, therefore, alleging that he was dispossessed in January 1905 by reason of the fraudulent suit brought by defendant No. 2, as an agent of the landlord, and the consequent execution purchase by defendant No. 1 brought this present suit in January 1908 for recovery of possession. The question in the case *inter alia* was whether the suit was barred by limitation under Art. 3 Sch. III of the Bengal Tenancy Act. The primary Court dismissed the suit but the first appellate Court reversed it. Against that decree, the defendants appealed to the High Court. The appeal came on for hearing before Mr. Justice Coxe who delivered the following judgment.

Coxe J.—The land in suit in this case was originally in the tenancy of one Madhu Bhuian. It appears that one Tara Prosad Pal who was at one time the *ijaradar* of the Mahal in which the land was, brought a suit against Madhu, obtained a decree and sold the holding. At the sale the holding was purchased by the plaintiff. That was in 1890. Many years after that, another suit was brought for rent against the same Madhu Bhuian and the property was purchased in the execution sale by the first defendant. The plaintiff's case was that this second decree and sale were fraudulent, and that he was all along the tenant of the land which he had sublet to the defendant No. 3, that he brought a suit against defendant No. 3 for rent in which defendant No. 3 repudiated the relationship of landlord and tenant. The suit was therefore dismissed and on enquiry the plaintiff came to know of this fraudulent decree and sale and that defendant No. 1 had purchased the holding. Defendant No. 3 claims to hold the land as a sub-tenant under defendant No. 1. Defendant No. 2 is the *gomasta* of the landlord in collusion with whom the decree is said to have been obtained. The plaintiff, therefore, alleging that he was dispossessed in January 1905 by reason of this fraudulent suit brought by defendant No. 2 and the consequent execution purchase by defendant No. 1 brings the suit for recovery of possession. The suit has been decreed and the defendant No. 1 appeals to this Court. It is first contended on behalf of the appellant that there is no sufficient legal evidence of the plaintiff's rights. The plaintiff's title as I have said is based on the purchase in 1890, and the question arose in the Courts below whether that purchase was made in the execution of a decree under the Tenancy Act under which the holding was sold for its own arrears or was made in the execution of a mere money decree

under which the tenancy would not pass. The learned Subordinate Judge held that the execution in the course of which the land was purchased was the execution of a rent decree. He based this finding on the sale certificate which showed that the execution case was a rent execution case and he inferred from that that the decree executed was also a rent decree, under the Tenancy Act. I am not prepared to say that if this were all I could interfere with the decision of the learned Subordinate Judge, based as it is on evidence, or could say that his finding was not a finding of fact. It is argued however that in coming to this conclusion the learned Subordinate Judge has clearly omitted to notice a very important piece of evidence, namely, that the *ijara* of Tara Prosad Pal admittedly came to an end in 1885 many years before the plaintiff's purchase. And it is argued that if the suit for rent was brought after the expiration of Tara Prosad Pal's *ijara*, the decree obtained by him would not be a rent decree and the holding would not pass at a sale in execution. Assuming for the purpose of this case that the suit for rent was brought after the expiration of Tara Prosad Pal's *ijara*, I have to decide whether on that account the decree could not possibly be a rent decree under the Tenancy Act in execution of which the holding itself could be sold. The learned pleader for the appellant relies on the case of *Srimant Roy v. Mahadeo Mahata* (1). That case is certainly in his favour. It was held therein that when a *ticcader* obtained a decree for rent after the expiration of his *ticca* all that he could sell was the right, title and interest of the tenant but that he could not sell the tenure. I am strongly inclined to follow this ruling. It seems to me very doubtful whether when the relationship of landlord and tenant has expired and the former landlord brings a suit against the former tenant for rent which accrued during the tenancy, that the money can still be regarded as rent as defined in the Bengal Tenancy Act. At the time the suit is brought the money it appears to me can hardly be said to be payable by a tenant to his landlord and I doubt, therefore, whether a suit for that money can be regarded as a suit for rent as defined in the Bengal Tenancy Act. There is however authority on the other side, namely the decision in the case of *Maharaj Bahadur Singh v. Forbes* (2). In that case the learned Judges considered that the case of *Srimant Roy v. Mahadeo Mahata* (1), to which I have alluded was no longer an authority

CIVIL

1918

Budra Narain

v.

Natober Jana.

Goss, J.

(1) (1904) L. L. B. 81 Calo. 550.

(2) (1908) L. L. B. 85 Calo. 787, 7 O. L. J. 662.

OCTOBER

1918.

Rudra Narain

v.
Narobor Jana.

O'Connell, J.

inasmuch as the case of *Hem Chunder Bhunjo v. Mon Mohini Dassi* (1) on which it was based had been overruled by a Full Bench. The case of *Hem Chunder Bhunjo v. Mon Mohini Dassi* (1) however is an entirely different case from the case of *Srimant Roy v. Mahadeo Mahata* (2) and I respectfully venture to doubt whether the Full Bench can be regarded as overruling it. There is also the case of *Chhatrapat Singh v. Gopi Chand Bothra* (3) in which the learned Judges certainly appear to have thought that the termination of the landlord's interest would not prevent his decree for rent or for what had been rent, from being executed under the provisions of the Tenancy Act by the sale of the tenancy in respect of which the rent had been payable, though as pointed out in the case of *Srimant Roy v. Mahadeo Mahata* (2) there is no formal decision on this point in the case. It seems therefore that there is a conflict of authority on this point and though I am inclined to follow the case of *Srimant Roy v. Mahadeo Mahata* (2) yet I must admit that the balance of authority is perhaps against the view taken in that case. But in the view that I take in this case it is unnecessary for me to come to a final decision on this point.

Secondly, it is argued that the learned Subordinate Judge was wrong in holding that the second decree in execution of which defendant No. 1 purchased the holding was fraudulent. The learned Subordinate Judge relied on certain *dakhilas* produced by the plaintiff which show that the landlord accepted rent from him as *marfatdar* and held that these *dakhilas* showed that the landlord knew that the plaintiff was in possession and that consequently the suit against the original tenant was fraudulent. It is argued on the authority of several cases of which the last is *Debnarain Dutt v. Baidya Nath (Madak) Nupit* (4) that these *dakhilas* did not show that the landlord had ever recognised the plaintiff to be the real tenant and that therefore he was entitled to sue the original tenant of the land. This however is not all the evidence on which the learned Subordinate Judge relies. He says, "the reason given by the learned Munsiff for his coming to the conclusion that the decree was not *bona fide*, are correct and fully supported by the evidence on the record"; and the Munsiff refers to other evidence such as a certain compromise between the landlord's *gomasta* and the plaintiff in addition to this evidence with respect to *dakhilas*.

(1) (1894) 8 C. W. N. 604.
(2) (1904) I. L. B. 81 Calo 550.

(3) (1899) L. L. B. 28 Calo 750.
(4) (1909) 14 C. W. N. 69.

The decision of the learned Subordinate Judge on this point, therefore appears to me to be a finding of fact based on evidence with which I cannot interfere in second appeal.

Thirdly, it is argued that the suit is barred by the law of limitation laid down in Schedule III to the Bengal Tenancy Act. It appears to me that this contention must prevail. The plaintiff was admittedly dispossessed in January 1905. It is clear that the manner of his dispossession was that the landlord obtained a decree for rent and in execution of that decree sold the holding which was purchased by the first defendant. It is now settled that when a tenant is dispossessed of his land by another tenant, and the landlord has a hand in the ouster the limitation laid down in the schedule applies. It has also been held that when a landlord sells a holding in execution of a decree for rent and the holding is purchased by another raiyat the special limitation will apply. The case of *Aminuddin Munshi v. Ulfatunnissa Bibi* (1) seems to me a clear authority for this view. There are several cases in which co-sharer landlords have sold the holdings for their shares of the rent due and purchased them themselves. And it has been held that in such cases when they dispossessed the tenants, the dispossession was not effected by them *qua* landlords but *qua* auction-purchasers. But these decisions appear to me to be wholly dissimilar to the case now before me. If the whole body of landlords bring a suit for rent, obtain a decree, and in execution sell the holding which is purchased by another tenant, I do not see how it can be disputed that they have a hand in the ouster. The learned Subordinate Judge holds that the landlord in this case had no hand in the ouster because everything was done by the *gomasta*, the defendant No. 2. He says "in this case there is nothing to show that the landlord was colluding with defendant No. 1. On the other hand it is clear that the defendant No. 1 is in collusion with defendant No. 2 who is not the landlord but who is landlord's *gomasta* who hoodwinked the landlord in all respects." This finding is totally inconsistent with a finding at which the learned Subordinate Judge arrived a little earlier in his judgment which runs as follows: "It was in my opinion fraudulent on the part of the zemindar to sue the old tenant instead of the plaintiff for rent. The *dakhilas* produced by the plaintiff show that the landlord knew that he was in possession. It is not disputed that the landlord was the plaintiff in the suit and the holder of the decree in execution of which the first

CIVIL.

1918.

Budra Narain

Natabar Jana.

Coke, J.

(1) (1908) 18 O. W. N. 108.

CIVIL.

1918.

Rudra Narain

Natoban Jana.

-Owee, J.

defendant purchased. It is not suggested the *gomasta* exceeded his powers in filing the suit for rent. It appears that the landlord lives elsewhere and leaves the whole management of his estate to his *gomasta*. He has no personal knowledge of the circumstances of the case. But I am assured by the learned pleader for the appellant that there is no evidence whatever on the record that the *gomasta* actively and deliberately concealed anything from the landlord in connection with this matter, and the learned pleader for the respondent to whom I gave an opportunity of looking through the evidence to see if he could question this assurance was unable to show to me anything which would imply that the landlord was in any way misled or deceived by the *gomasta*. A finding of fact which is based on no evidence whatever can be questioned in second appeal, and even if the rent suit which resulted ultimately in the dispossession of the plaintiff was brought by the landlord in ignorance or even by being deceived that fact does not make it any the less true that the plaintiff was dispossessed by the action of the landlord.

Under the circumstances, it seems to me that the landlord must be regarded as the real plaintiff in the suit for rent and the real decree-holder in the execution case in the course of which the first defendant purchased the holding. Therefore it appears to me clear that the landlord had hand in the ouster of the plaintiff, and the limitation laid down in Schedule III to the Tenancy Act applies. The dispossession took place in January 1905 and the suit was instituted in January 1908. The suit therefore appears to me to be barred by limitation. The appeal must be allowed and the suit dismissed with costs of this Court and of the first appellate Court.

From this decision the plaintiff appealed under section 15 of the Letters Patent.

Babus Sib Chandra Falit and Kherode Narain Bhuyan for the Appellant.

Babu Mohini Mohan Chatterjee for the Respondent.

The judgment of the Court was delivered by

Jenkins O. J.—The only point that arises on this appeal is whether the plaintiff's suit is barred by Article 3 in the third schedule to the Bengal Tenancy Act. This is an Article which after a lapse of certain time deprives the plaintiff of his right to come to Court for the purpose of vindicating a claim which is his, and therefore it must be clearly made out that any particular

case falls within its terms. We recently had occasion to enter a protest against extending the terms of this Article by use of figures of speech and metaphors. (1) What we have to see in each case is, whether in fact there has been such dispossession as the Article requires. That dispossession, it is conceded, must be by the landlord. The Subordinate Judge, untrammelled by the various authorities which can be cited one way or the other, came to the conclusion on the facts that there had been no dispossession by the landlord. I see no reason why the High Court should interfere with that finding. It is a finding for which there is foundation in the evidence, and, in my opinion, it would be erroneous to interfere with it. Mr. Justice Cox has interfered with it; and in so doing, we think he has committed an error. We must, therefore, reverse his judgment and restore the decree of the lower appellate Court.

The appellant before us must have the costs of the two appeals in the High Court.

A. T. M.

Appeal allowed.

(1) *Basanto v. Nanda*, (1918) 18 C. L. J. 8.

*Before Sir Asutosh Mookerjee, Knight, Judge,
and Mr. Justice Beachcroft.*

MIR ABDUL AZIZ

v.

KARU*.

Penalty—Lease, construction of—Agreement, non-performance of—Agreement not to take particular defence.

Where in a lease granted for a term of years at a certain rate, it was provided that the tenant should give up the land on the expiry of the term and if, upon the expiry of the term, he claimed a right of occupancy or caused a claim to be put up by any other person, he would be liable, while holding over, to pay higher rent:

Held, that the clause as regards payment of higher rent, being in the nature of a penalty, was not enforceable.

Tijendra Narain v. Bakai Singh (1) followed.

Ganpat v. Jasodhar (2) and *Gobind Mandar v. Banarsi Prasad* (3) distinguished.

Appeal by the Plaintiff.

Suit to recover arrears of rent.

The facts of the case are stated in the judgment.

* Appeal from Appellate Decree No. 1141 of 1911, against the decree of S. S. Skinner, Esq., District Judge of Purnea, dated the 16th February, 1911, affirming that of Babu Sita Nath Ghose, Munsiff of Araria, dated the 25th May 1910.

(1) (1896) I. L. B. 22 Calo 658.

(2) (1895) 17 Q. L. J. 590.

(3) (1912) 18 C. L. J. 74.

CIVIL

1918.

Rudra Narain

v.

Natobur Jana.

Jenkins, C. J.

CIVIL

1918.

March, 6.

CIVIL.

1918.

Mir Abdul Aziz

Karu.

March, 6.

Babus Jogendra Nath Mukerji and Bisso Nath Sen for the Appellant.

Babu Nunda Lal Banerjee for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the plaintiff in a suit for recovery of arrears of rent. The defendants originally held under a lease dated the 29th January 1904; the settlement was for a term of 4 years at the rate of Rs. 24 per year. The lease provided that the tenants should give up the land upon the expiry of the term, and that if, upon the expiry of the term, they claimed a right of occupancy or caused a claim to be put up by any other persons, they would be liable, while they held over, to pay rent at the rate of Rs. 48. The tenants did not quit the land upon the expiry of the term. It was consequently open to the plaintiff to eject them, in a suit appropriately framed, on the ground that they were not entitled to continue in occupation of the land. He has not done so; on the other hand, he has treated them as tenants holding over upon the expiry of the term, and he has brought this suit to recover arrears of rent for four years, namely, two years before and two years after, the expiry of the term. As regards the first two years, there is no question that he is entitled to claim rent at the rate of Rs. 24 only. As regards the last two years, he claims rent at the rate of Rs. 48 on the ground that the defendants, contrary to the agreement in the lease, set up a right of occupancy in the settlement proceedings under the Bengal Tenancy Act. The question consequently arises, whether the clause in question is enforceable in law. The Courts below have concurrently held that the covenant is in the nature of a penalty and is not enforceable. This view is clearly right and is supported by the decision in *Tejendra Narain Singh v. Bakai Singh* (1). There, the lease was granted for a term of years and the tenant agreed that if he held over upon the expiry of the term without executing a fresh *kabuliat*, he would pay rent at an increased rate. It was ruled by Mr. Justice Prinsep and Mr. Justice Ghose that the clause for payment of increased rent was intended to be enforceable only if the tenant defaulted to execute a fresh *kabuliat* and that the agreement was consequently in the nature of a penalty. The principle of this decision is obviously applicable to the case before us. Reliance, however, has been placed upon the decisions in *Ganpat Singh v. Jasodhur Singh* (2) and

(1) (1895) I. L. B. 22 Cal. 658

(2) (1895) 17 C. L. J. 590.

Gobind Mandar v. Banarsi Prasad (1). But these cases are clearly distinguishable. In these cases the lease had been granted for a term at a rent specified, and the tenant had agreed that if he continued in occupation after the expiry of the term, he would pay rent thereafter at a higher rate than before. Clearly there is nothing unlawful in an agreement of this description. It is open to parties, subject to the provisions of section 29 of the Bengal Tenancy Act, to come to an agreement to the effect that for a certain number of years the tenant would pay at a prescribed rate, and for the years following at a higher rate. But in the case before us, as also in *Tejendro Narain Singh v. Bakai Singh* (2), it is clear that the increased rate of rent was not deemed as the proper consideration for the occupation of the land by the landlord; it was rather in the nature of a penalty to be imposed upon him if he should fail to carry out his agreement to the effect that he would execute a fresh *kabuliat* or he would not take a defence of a particular description. If a landlord tells a tenant, you can occupy my land on a rent of Rs. 10 a year, but if you do not execute a *kabuliat* or if you claim an occupancy right in the land, you will be liable to pay Rs. 20 a year as rent, and the tenant accepts the lease on these terms, the agreement to pay the enhanced amount is plainly by way of penalty and is not enforceable in law.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1918) 18 O. L. J. 74.

(2) (1893) I. L. B. 22, Calc. 668.

• *Before Mr. Justice Brett and Mr. Justice Mookerjee.*

CHOWDHURY RAM PRASAD SINGH

v.

CHOWDHURY PAWAN SINGH AND OTHERS.*

Fraud—Revenue sale—Defaulting co-sharer purchaser—Co-sharers in joint estate, relation between, as to payment of share of Government revenue—Mutual confidence—Revenue Sale Law (Act XI of 1859), Sec. 7—Irregularity—Sale notification—Error as regards specification of shares immaterial—Fraud—Revenue sale, notice of, concealment of, evidence of, if relevant.

Where a revenue sale is caused by the default of a co-owner and the property is afterwards purchased at that revenue sale by that co-owner, there may be such relations between the defaulter and his co-owner as would make it right for the Court to treat such a sale as made for the benefit of both.

* Appeal from Original Decree No. 545 of 1904, against the decree of Babu Basu Bhushan Chowdhury, Subordinate Judge, First Court, of Shahabad, dated the 1st September, 1904.

CIVIL.

1918.

Mir Abdul Aziz

v.

Karu.

Mookerjee, J.

CIVIL

1907.

April, 11.
May, 7, 8, 9.
August, 20, 28.

CIVIL

1907.

Ram Prasad

v.
Pawan Singh.

Ordinarily a co-sharer in a property would be entitled to expect, in the absence of any circumstance supporting the contrary view, that his other co-sharers would act in concert with him for the common object of protecting the property in which all are jointly interested, and when a co-sharer wilfully defaults in paying in the Government revenue, his conduct is not such as his co-sharers might reasonably expect from him.

Where default had occurred owing to the wilful default of one co-sharer but of which wilful default another co-sharer might not be aware, if the former should accompany the latter to the Collector with the ostensible object of having the arrears accepted and if the application to the Collector having failed and the property having been put up for sale, the former bid for the property in concert with and not in opposition to the latter and set up some other person as the real purchaser but remained in possession and the facts supported the conclusion that the whole previous conduct of the first-mentioned co-sharer, taken in conjunction with and explained or interpreted by his later conduct, indicated that from the first act in defaulting up to the final act when he attempted to secure possession and title as against his co-sharer by setting up a third person as the purchaser he had intended to mislead and overreach his co-sharers:

Held, those facts would be sufficient to support a case of fraud.

Doorga Singh v. Shoo Pershad Singh (1) doubted and commented on.

A co-sharer is not under any legal obligation to his co-sharers to pay in his share of the Government revenue.

Evidence to prove the concealment of notice of revenue sale is relevant to support the allegation of fraud.

The residue of estate to be sold for arrears of revenue must be described in the notification of sale with sufficient accuracy and fulness to enable the impending purchaser to know what is in fact the property that is offered for sale, and where the residue share is entered in the notification as the residue only without giving its amount or giving the shares of which it consists or stating the other shares which are excluded from the sale, such a description is not a sufficient compliance with section 13 of the Revenue Sale Law. The fact that shares in certain mouzas were entered 3 as. 11 p. instead of 2 as. 8 p. and which mistake was not a material one, would not make the sale notification an irregularity and illegality.

Appeal by Defendant No. 2.

Suit for declaration that a purchase by a defaulting co-sharer at a revenue sale was made fraudulently and that the plaintiffs were entitled in equity to claim from the defaulting co-sharer a reconveyance to them of their original share of the estate sold.

Mr. O'Kinsally (Advocate-General), Babus Mohendra Nath Roy and Raghu Nath Singh for the Appellant.

Babus Umakali Mukerjee, Mahan Lal and Kuntwant Sahay for the Respondent.

C. A. V.

The judgment of the Court was as follows:

The present appeal arises out of a suit brought to set aside

(1) (1889) I. L. R. 16 Calo. 194.

August, 23.

a sale for arrears of Government revenue of the residue share in Mahal Dawath Touzi No. 3308.

It appears that the Mahal is a large estate consisting of 7 mouzas that it is owned by a large number of proprietors having distinct shares in one or more of those mouzas. In respect of the Government revenue due on the whole estate, four separate accounts have been opened by four groups of owners and the residue or *ijmali kalam* forms a fifth account. This *ijmali kalam* belonged to the plaintiff and defendants No. 1 and Nos. 3 to 21. The case for the plaintiff was that the defendant No. 1 and defendants 3 to 21 purposely did not pay the revenue of their share on account of the *kist* of June 1903, that they fraudulently kept their default concealed from the plaintiff, that they had the proclamations of sale served surreptitiously so that the plaintiffs had no knowledge of them and that it was not till a few days before the day advertised for sale that the plaintiff became aware that there was any arrear, and then that two of them were induced by defendant No. 1 to go with him and make a joint application to the Collector praying that the arrear might be received. That application was rejected, and the *ijmali kalam* was sold at auction and was purchased by the defendant No. 1 for Rs. 4,000, the real value of the share being Rs. 50,000. The plaintiffs further state that they appealed to the Commissioner to set aside the sale on the ground of irregularities, one of them being that the shares in the villages Nilkanthpore and Guthani which amounted to only 2as. 8p. each had been advertised for sale as consisting of 2as. 11p. odd, that the share so advertised had been sold and had been included in the sale certificate. The Commissioner however dismissed the appeal holding that the defaulting proprietors had not been prejudiced by the sale of a larger share and directing that, as the purchaser raised no objection the amount of the shares sold should be entered in the sale certificate as 2as. 8p. only. The plaintiffs alleged that after the dismissal of the appeal they asked the defendant No. 1 to reconvey to them a share of the property which he had purchased proportionate to their original share alleging that the sale had been brought about by his fraud. He however refused their request and the defendants Nos. 3 to 21 being in collusion with defendant No. 1 they have been made joint defendants in the present suit. The defendant No. 2 was made a party because the allegation of the defendant No. 1 was that he had purchased the estate *benami* for defendant No. 2.

CIVIL.

1907.

Ram Prasad
v.
Pawan Singh.

CIVIL

1907.

Ram Prasad
v.
Pawan Singh.

This the plaintiffs alleged to be untrue and stated that the defendant No. 1 had purchased the property on his own behalf. They further alleged as a ground for setting aside the sale that at the time when the *ijmali kalam* was sold, there was in fact no arrear due from that share, that three sums which had been paid into the Treasury on account of the *ijmali* share and had at first been entered in the Collectorate Register as payments on account of that share had subsequently been transferred without authority to the credit of other shares and these three sums amounted to Rs. 109-2-9, and that, as the arrears for which the estate was sold were Rs. 94-8-10, there was in fact at the time of sale an amount standing to the credit of the *ijmali kalam* of Rs. 8-5-4. Various irregularities in the preparation of the notices under sections 6 and 7 of Act XI of 1859 and in entering the *sadar jama* of the *ijmali kalam* were also mentioned, and it was alleged that on account of these irregularities and fraudulent proceedings on the part of the defendant No. 1 intending purchasers were not fully aware of the sale, that they were deterred from bidding by the knowledge of these irregularities and in consequence the property which was valued at over Rs. 50,000 was sold for Rs. 4,000 only. They prayed for a declaration that the sale of the *ijmali kalam* held on the 24th August 1903 was entirely null and void, invalid, illegal and inoperative, that the decision of the Commissioner was illegal and that the whole sale should be set aside; in the alternative, if the Court should hold that the sale could not be set aside, then a declaration was prayed for that the sale was brought about owing to the default and fraud on the part of defendant No. 1 and defendants 3 to 21 and that in consequence the plaintiffs were entitled in equity to claim from defendant No. 1 a reconveyance to them of their original share in the share of the estate sold. They further prayed for interest and costs.

The suit was originally taken on the file of the District Judge of Shahabad and six issues were framed by him on the 20th and 27th May 1904. The 2nd and 3rd issues were to the following effect: Issue No. 2. "Was there any irregularity in drawing up or publishing the notices under sections 6 and 7? Have plaintiffs suffered any loss thereby? Can the plaintiff obtain any relief on that ground? Issue No. 3. "Was any notice published under section 5? If not, was the plaintiff entitled to any relief on that ground." Dealing with these two issues the District Judge found that the irregularities complained

CIVIL.

1907.

Ram Prasad

v.

Pawan Singh.

of and which were the subject of the second issue, were irregularities in the notices themselves and in their publication and he held that, under the provisions of section 8 of Act VII (B. C.) of 1868 the fact that he had obtained a sale certificate was conclusive evidence in favour of the purchaser that the notices required by that Act or Act XI of 1859 had been served and posted. He therefore found that issue against the plaintiff. As regards the third issue he found that no notice under section 5 was necessary and decided that part of the issue against the plaintiff. He reserved for further consideration the question whether the plaintiff is entitled to relief on the ground that the estate was sold for arrears other than those of the current year. On the 2nd July the suit was transferred for trial to the Court of the Subordinate Judge and was finally heard and disposed of by that officer. A seventh issue was framed by the Subordinate Judge on the 17th August 1907. Defendants No. 1 and 2 alone filed written statements and defended the suit. Defendants 22 to 25 and 30 joined as plaintiffs and the other defendants did not enter appearance. Defendant No. 1 in his written statement alleged that he purchased the property for defendant No. 2 and not for himself and denied that there was any fraud. Defendant No. 2 denied the allegations of the plaintiff as to irregularity and illegality in the matter of drawing up and service of notices, as to the non-existence of arrears, and alleged that the plaintiffs had no ground to have the sale set aside on the basis of fraud. He alleged that he was the purchaser of the property. The first issue raised in the case was "were there any arrears due?" In dealing with this issue the Subordinate Judge refers to the three items of payment on which the plaintiff relied (1) Chalan No. 3775, dated the 7th June 1895 Rs. 73 (2) Chalan No. 1840, dated the 11th January 1897, Rs. 16-2-9, (3) Chalan No. 1889, dated the 28th March 1898 Rs. 20.

On the evidence the Subordinate Judge holds that these three sums should have been added to the credit of the *ijmali* account, and that, when that had been done there was on the date of the June *kist* on the 7th June 1903 a credit of Rs. 11 to the *ijmali khata* and not an arrear. He therefore comes to the conclusion on the first issue that the sale was void on that ground alone, and that at the time of the sale there were no arrears in respect of which the *ijmali* share could be sold.

Dealing next with the grounds of irregularity and illegality the Subordinate Judge expresses some doubt as to the correct-

CIVIL.

1907.

Ram Prasad
v.
Pawan Singh.

ness of the finding of the District Judge on the 2nd issue, he himself being of opinion that as the sale certificate was obtained two months after the institution of the suit it could not be produced to debar the plaintiff in the present suit from proving irregularities in the preparation and service of notices. He then deals with the objection taken to the sale on the ground of irregularity for non-compliance with section 13 of Act XI of 1859. Relying on certain judgments of this Court to which he refers he holds that the specification of the *ijmali* share given in the notification was not a sufficient compliance with the terms of that section. The specification, it may be observed, states that the residue share is to be sold and gives the different shares in the different villages of which that share consists. The Subordinate Judge however held that it was necessary for the Collector also to state not only that the other shares were excluded from sale but also to specify in detail the amount of the other shares and as such specification had not been made, he holds there was an irregularity in this notice and he proceeds to indicate what in his opinion was the result of the illegality, namely, that the shares in mouzas Gothani and Nilkantpore which were sold were erroneously described as larger than the actual shares included in the *ijmali kalam*. He criticises the action of the Commissioner in directing the correction of the sale certificate and expresses the opinion that the order of the Commissioner was illegal, and that the Commissioner had no authority to annul a sale in part and confirm it as to the other part. He holds on that ground that the whole sale ought to have been set aside.

Dealing next with the question of substantial injury he comes to the conclusion on the evidence that the value of the property is Rs. 50,000, and as it has been sold for Rs. 4,000, the plaintiffs have suffered substantial injury by the sale. He comes to the conclusion that as the price is grossly low and inadequate the legitimate inference may be drawn that the inadequate price was due to the irregularities.

Next he proceeds to deal with the sale certificate which was made out in the name of defendant No. 2 though the property was according to the bid sheet sold to defendant No. 1. He comes to the conclusion that the Deputy Collector who issued the sale certificate had no authority under the law to issue it to defendant No. 2 that his action was illegal and that defendant No. 2 acquired no title under that certificate.

CIVIL
1907.
Ram Prosad
v.
Pawan Singh.

Lastly he deals with the question of fraud. He finds on the evidence that defendants 1 and 3 to 21 did not pay their revenue for January, March and June ~~kists~~ with the exception of Rs. 18 only in January. He finds that the purchase at the auction sale was in fact made by defendant No. 1 Hardwar Singh ; and that this is clear from conflicting statements made by Hardwar and by Harihar the agent of Ram Prosad defendant No. 2 in their evidence. He is of opinion that the payment of the balance of the price was made in the name of defendant No. 2 merely as a blind to conceal the fact that defendant No. 1 was the real purchaser and that the sale certificate and delivery of possession were obtained in favour of that defendant for the same purpose. This he held to be clear from the fact that defendant No. 1 has since the purchase remained in possession of the share of the property sold. He finds that Ram Prosad is a relative of the defendants Sadho and others and that there is a secret arrangement between Ram Prosad and defendant No. 1 and other defendants under which the purchase money paid in his name was really paid on their behalf. He notices the fact that prior to the sale the defendant No. 1 and another defendant accompanied the plaintiff to put in a petition for permission to pay in the arrears but he holds that it was merely to deceive the plaintiff into the belief that the default on their part had not been intentional. He held therefore that the plaintiffs had established their case on all the points and gave them a decree declaring the revenue sale to be void and inoperative as against them.

The defendant No. 2 has appealed.

* * * * *

[Their Lordships after discussing the evidence as well as the additional evidence taken in the High Court came to the following conclusions.]

That the first ground on which the Subordinate Judge has held that the sale is liable to be set aside must fail.

As regards the ground taken that the notice of sale was not prepared in compliance with the provisions of section 13 Act XI of 1859 we are also of opinion that the view taken by the Subordinate Judge cannot be maintained. All that has been held in the cases to which the Subordinate Judge refers is that the residue must be described in the notification of sale with sufficient accuracy and fullness to enable the intending purchaser to know what is in fact the property that is offered for sale, and where the residue share is entered in the notification as the residue only without giving its amount or giving the shares of

CIVIL.

1907.

Ram Prasad
v.
Pawan Singh.

which it consists or stating the other shares which are excluded from the sale, such a description is not a sufficient compliance with the section. In the present case, however, the notification mentions the residue share and states distinctly the shares in the different villages of which that residue share consists. It also states that the other shares are excluded from sale. It is not alleged that there was any material error in the description except with regard to the shares in mouza Guthani and Nilkantpur which were entered 2 as. 11 p. instead of 2 as. 8 p. We are not prepared to agree with the Subordinate Judge that there was in the notification any failure to comply strictly with the terms of section 13 of Act XI of 1859 and therefore we hold that there was no irregularity in the drawing up of that notification.

Nor do we think that the remarks made by the Subordinate Judge with reference to the action of the Commissioner are justified. No doubt, in the notification of sale and in the sale certificate the shares in these two villages which were put up for sale were entered as 3 pies in excess of the actual shares. The auction-purchaser, however, was willing to take a certificate for the actual shares and relinquish all claim to the additional 3 pies. Under these circumstances, we are not prepared to say that there was anything illegal in the action of the Commissioner in allowing the sale certificate to be altered by the substitution of 8 pies for 11 pies in the share of each of these estates.

There remains for consideration lastly the question of fraud and whether the plaintiffs are entitled in this suit either to have the sale set aside on the ground of fraud or to obtain a decree directing that defendant No. 1 shall convey to them a share in the properties purchased by him proportionate to their share in the original share in the estate sold. In dealing with the cases of fraud, the learned counsel for the appellant has contended that there was no distinct allegation of fraud in the plaint or in the evidence in the Court of first instance, and therefore that the plaintiffs cannot be allowed to succeed on the ground of fraud. In support of that view, he relies on the case of *Doorga Singh v. Shao Pershad Singh* (1) which was followed in the case of *Goncsk Persad v. Pandey Brij Bahary* (2). The case of the plaintiff respondent was, however, that defendant No. 1 and his co-sharers defendants Nos. 3 to 21 had wilfully defaulted to pay in the Government revenue with the intention that the property

(1) (1889) I. L. B. 16 Calo. 194

(2) (1902) 1 C. L. J. 565 (571).

should be put up for sale, that they had concealed their fraud from the plaintiff and that by inducing the Collectorate officers to serve the notice of sale surreptitiously they had concealed from the plaintiffs the fact of the properties being put up to sale until it was too late for the plaintiffs to prevent the sale. Evidence to prove the concealment of the notice was in our opinion relevant to support the allegation of fraud based on this and other grounds. In the lower Court no evidence was adduced to prove under what circumstances the notices were issued. We have therefore directed the lower Court to allow evidence to be given on this point—the plaintiff to prove that there was concealment of the notices and the defendant to prove that the notices were duly served without any attempt at concealment. On this evidence now coming before us we have again heard the learned Advocate-General on behalf of the appellant and the learned pleader for the respondent both with regard to this evidence and with regard to the question of fraud. We have read the fresh evidence adduced and we agree with the learned Advocate-General that it fails to prove any such collusion between the defendants and the officers of Government entrusted with the service of the various notices and processes connected with the sale for the purpose of concealing the service from the plaintiff as would justify us in holding that the defendant has committed fraud by any such concealment and suppression and so brought about the sale of the property. The learned pleader for the respondent admits that he is unable to contend that the fresh evidence makes out a case of fraud.

The learned pleader for the respondent however contends that apart from this evidence, the facts proved and the conduct of the defendant No. 1 Hurdwar Singh are sufficient to support the conclusion that the plaintiffs have lost their share in the property sold by reason of fraud on the part of Hurdwar Singh and his co-sharer. It is argued that in fact he was the purchaser of the property at the sale for arrears of revenue, that he was so entered by the Collector at the time of the sale that the Collector had no power afterwards to substitute the name of Ram. Prasad, the relation of the defendant Sadho and others as the purchaser when the balance of the purchase money was paid, that defendant No. 1 had that substitution fraudulently made with the object of concealing his own fraud by suggesting that in purchasing the property he was the agent of Ram Prasad and with the further object of preventing the plaintiff from

CIVIL.

1907.

Ram Prasad

Pawan Singh.

CIVIL.

1907.

Ram Prasad
v.
Pawan Singh.

recovering his share of the property which he might have tried to do if he, defendant No. 1, had stood forward as the purchaser. It is contended that the successive defaults on the part of defendant No. 1 to pay in his share of the three *kists* of Government revenue due in January, March and June was wilful and intentional and with the fraudulent object of obtaining the whole of the property for himself at the sale, that when he accompanied the plaintiff to the Collector before the sale with the ostensible object of inducing the Collector to receive the arrears, he knew that the application was futile, that in taking Rs. 1,000 in with him he went prepared to bid if the property were sold, that at the sale he bid in conjunction with and not against the plaintiff thereby inducing the plaintiff to believe that both had the common object of preventing the property from passing out of their hands, and that when other bidders stopped biddings, seeing that the original proprietors were making bids with the intention of saving the property, he succeeded in having the property knocked down to him, that even then he allowed his own name to be entered as the purchaser and the plaintiff to believe that the property had been saved for the original proprietors and that it was only afterwards that he tried to carry his fraud into full effect and prevent the plaintiff from recovering his share of the property by having the name of Ram Prasad substituted for his as the purchaser when the balance of the purchase money was paid. The learned pleader contends that this is a case in which, though he admits that the plaintiffs have not been able to make out such a case of fraud as would entitle them to have the sale set aside as void still they have against defendant No. 1 and his *benamdar* Ram Prasad made out a sufficient case of fraud to entitle them to similar relief to that granted in the case of *Bhoobun Chunder Sen v. Ram Soonder Summa Mosoomdar* (1) that is to say, to a decree directing the defendants to reconvey to the plaintiffs the share in the estate which they originally held. The learned pleader in support of his contention also relies on the case of *Amirunessa Khatoon v. The Secretary of State for India in Council* (2) in which the view taken in the case of *Bhoobun Chunder v. Ram Soonder* (1) was approved and on the case of *Amirunessa Khatoon v. E. Browne* (3) in which the same view was taken.

The learned Advocate-General for the appellant on the

(1) (1877) 1, L. R., 8 Calo. 800.

(2) (1888) 1, L. R., 10 Calo. 63.

(3) (1888) 18 O. L. R., 181.

other hand contends that the suit of the plaintiffs must fail entirely. He argues that the plaintiffs have failed to prove any overt acts of fraud against defendant No. 1 or that the sale was brought about by fraud on his part. He contends that under the law a co-sharer in an estate is not under any legal duty to his co-sharer to pay in his share of the Government revenue so as to save the estate from sale for default, that the risk of default on the part of a co-sharer is one of the necessary and unfortunate incidents of holding revenue-paying estates jointly with others and that it is the duty of the co-sharers for their own protection to satisfy themselves that their co-sharers have paid in their shares of the Government, that any co-sharer may default if he pleases with the object of buying in the whole property if it should subsequently be sold for arrears and that at the sale a co-sharer is entitled to buy in the property for himself alone and that the other co-sharers have no claim on him. He relies on the cases of *Doorga Singh v. Shao Pershad Singh* (1) *Deonandan Singh v. Munbodh Singh* (2). Special reliance is placed on the remarks of Mr. Justice Banerjee in his judgment in the first of the three cases in which he says "every co-sharer in a zemindari may if he chooses bring it to sale by not paying the revenue, but every other co-sharer can save it from sale by paying the arrear and can recover the amount from the defaulter. The fact of the defendants being co-sharers in the property did not clothe them with any fiduciary character which disqualified them from buying the property unless it was for the benefit of all the co-sharers."

We agree with the learned Advocate-General that it is not possible to hold that a co-sharer is under a legal obligation to his co-sharers to pay in his share of the Government revenue, but we think that in that case Mr. Justice Banerjee goes too far when later in his judgment he says that the fact that the defendants having been co-sharers with the plaintiffs did not clothe them with any fiduciary character at all. We think that if the term fiduciary character be used in its broadest sense, this goes too far, for we consider that it is not possible to hold that between co-sharers in a joint estate, all being liable to pay their *quota* of the Government revenue according to their respective shares, no relation of mutual confidence exists. Otherwise the position of co-sharers in a revenue paying estate, if they were always open to be overreached and deceived by their co-sharers, would

CIVIL,

1907.

Ram Prasad

v.

Pawan Singh.

(1) (1889) L. L. R. 16 Calo. 194. (2) (1904) I. L. R. 32 Calo. 111.

CIVIL

1907.

Barn Prasad

v.
Pawan Singh.

be intolerable. And we think that this condition of confidence, which must under such conditions exist between co-sharers, is important in a case like the present as bearing on the view which other co-sharers are justified in taking when interpreting the conduct of one of their co-sharers. Ordinarily a co-sharer in a property would be entitled to expect, in the absence of any circumstance supporting the contrary view, that his other co-sharers would act in concert with him for the common object of protecting the property in which all are jointly interested, and when a co-sharer wilfully defaults in paying in the Government revenue, his conduct is not such as his co-sharers might reasonably expect from him. Again, when default has occurred owing, it may be, to the wilful default of one co-sharer but of which wilful default another co-sharer may not be aware, if the former should accompany the latter to the Collector with the ostensible object of having the arrears accepted, the latter would reasonably be entitled to suppose that his co-sharer was acting in unison with him for their mutual benefit, and if the application to the Collector having failed and the property having been put up for sale, the former bid for the property in concert with and not in opposition to the latter, the latter would reasonably be entitled to believe that such bid was for their mutual benefit and in consequence to refrain from bidding in opposition.

If after the sale had been completed and the property knocked down to the first-mentioned co-sharer, he at once set up some other person as the real purchaser, and if it were found that that person was not the real purchaser but the co-sharer was the real purchaser and remained in possession, and if the facts supported the conclusion that the whole previous conduct of the first-mentioned co-sharer, taken in conjunction with and explained or interpreted by his later conduct, indicated that from the first act in defaulting up to the final act when he attempted to secure possession and title as against his co-sharer by setting up a third person as the purchaser, he had intended to mislead and overreach his co-sharer, would not these series of acts be sufficient to make out a case of fraud against the co-sharer purchaser? We think that having regard to the special relations existing between the parties, they would be sufficient to support a case of fraud.

In the case before us, we have the fact that the defendant No. 1 defaulted, not once which might have been the result of accident but on three successive occasions. Such conduct

unexplained, and no explanation seems to have been suggested, can only be interpreted as intentional. We start therefore with the fact that on three successive occasions the defendant No. 1 intentionally defaulted to pay his *quota* of the Government revenue.

He must have been fully aware that the probable consequence of such conduct on his part, if not detected in time by his co-sharers, would be that the estate would be put up for sale. It may be taken then that his wilful default had for its intention that the whole estate should be brought to sale.

It seems true and to be proved by the evidence that the plaintiff knew nothing about the default until the notices for sale of the property were issued. Defendant No. 1 then went with the plaintiff to the Collector with the ostensible object of having the sale stopped and the arrears accepted. The case for the plaintiff is that this conduct on the part of defendant No. 1 was intended to deceive the plaintiff into the belief that he was acting in concert with him for their joint benefit. The previous and subsequent conduct of defendant No. 1 seems to support this contention.

The application to the Collector having been refused, the property was put up for sale. Then there is the significant fact that the defendant, when he went in the Collector's office ostensibly to stop the sale, took Rs. 1,000 with him. This seems rather to support the conclusion that he went, expecting that the property would be sold and prepared to bid for the property, and goes to indicate what his intention was throughout.

* At the sale as evidenced by the bid sheet we find five bidders, *viz.*, defendant No. 1, the plaintiff, Hanka Rai the alleged agent of Ram Prasad, and two others. Mahadeo the plaintiff offered three bids only, all in support of and none in opposition to Hardwar the defendant No. 1, while Hanka Rai only offered one bid in opposition to Hurdwar Singh who promptly overbid him. These facts certainly fail to support the case which defendant No. 1 afterwards set up to the Collector that he had purchased for Ram Prasad. Further they go to support the view that the conduct of Hardwar at the sale led the plaintiff to believe that he was bidding for their joint benefit. If as was subsequently set up he was bidding for some one else he certainly in this respect deceived the plaintiff. Equally too there was deceit if his intention was to secure the whole property for

CIVIL.

1907.

Ram Prasad

Pawan Singh.

CIVIL.

1907:

Ram Prasad

v.

Rawan Singh.

himself while leading the plaintiff to believe he was acting in concert with him for their mutual protection.

The learned Subordinate Judge has found that in fact defendant No. 1 purchased for himself and that Ram Prasad was afterwards brought forward as a *benamdar* either with the object of concealing or making more secure, his fraud. Whether the Collector after he had accepted Hardwar Singh as the purchaser was justified under the law in afterwards issuing the sale certificate in the name of Ram Prasad is doubtful as it would seem that under the law the title remained with the accepted purchaser Hardwar Singh defendant No. 1, but the conclusion at which the Sub-Judge has arrived is fully supported by the evidence and there seems no reasonable doubt that Hardwar Singh is the real purchaser and Ram Prasad is a mere name. What transpired at the sale leaves no doubt that Hardwar was not acting for Ram Prasad—Hardwar's subsequent conduct in connection with the proceedings in the criminal Court and the fact that he is still in possession of the property leave no doubt that he is the actual purchaser.

Lastly there is the fact that property valued at Rs. 50,000 has been purchased for Rs. 4,000 and the plaintiffs have not only lost their share in the property but have suffered a severe pecuniary loss. And this loss appears to have been the result of the conduct of the defendant No. 1 at the sale, as when he was found to be bidding with the apparent object of saving the property from sale, other bidders desisted.

The question is whether these acts and this course of conduct of defendant No. 1 make up a sufficient case of fraud in favour of the plaintiffs to entitle them to the reconveyance of their share of the property by defendant No. 1 and the *benamdar* defendant No. 2. In our opinion they make out a clear and strong case of fraud against defendant No. 1. First there was on his part wilful default in paying his share of the Government revenue with the intention of having the whole estate brought to sale. This was followed by the deceit practised on the plaintiff before the Collector and at the sale all of which induced the plaintiff to believe that he was acting in concert with him for their joint benefit. Lastly there was false substitution of Ram Prasad as the purchaser, after the property had been knocked down at a thirteenth of its real value, the object of which clearly was to bar any relief which the plaintiff might try to claim against defendant No. 1 as his co-sharer. This fraud on the

part of the defendant No. 1 is in our opinion such as to entitle the plaintiff to a decree against him directing him and his *benamdar* defendant No. 2 to reconvey to the plaintiffs their original share in the estate on receipt from them of the share of the purchase money due from them.

The result therefore is that, though we are unable to support the judgment or decree of the Subordinate Judge and hold that the sale is void by reason of fraud in the proceedings under which the property was sold, we find that on account of the fraud practised by defendant No. 1 the co-sharer of the plaintiffs in fraudulently contriving to have the estate brought to sale and himself purchasing it, the plaintiffs are entitled to a decree against the defendants Nos. 1 and 2 directing them to execute within one month a deed of reconveyance to the plaintiffs of their share in the estate on their paying to him a share of the purchase money paid at the sale for arrears of Government revenue and appropriated by the Government proportionate to the plaintiffs' share in the estate.

As the appellant has failed in obtaining any real relief in this appeal, he will pay their costs of this appeal to the respondents.

A. T. M.

Appeal dismissed.

Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

FAIZUR RAHMAN AND OTHERS

v.

MIMANSA KHATUN *alias* KHALA BIBI.*

Trustee—Revenue sale—Defaulting co-owner purchaser—Purchaser, if trustee for other co-owner.

Where a revenue sale is caused by the default of a co-owner and the property is afterwards purchased at that revenue sale by that co-owner, there may be such relations between the defaulter and his co-owner as would make it right for the Court to treat such a sale as made for the benefit of both.

Doorga Singh v. Shoo Pershad Singh (1) doubted and commented on.

Appeal by the Defendants.

The plaintiff sued to recover possession of her share in certain properties inherited by her from her parents and which

* Letters Patent Appeals Nos. 27 and 28 of 1911, against an order of remand by Mr. Justice N. B. Chatterjee, dated the 8th February, 1911, in Appeal from Appellate Decree No. 215 of 1909, against the decree of Babu Sashi Bhushan Sen, Additional Subordinate Judge of Chittagong, dated the 14th November, 1908, reversing that of Babu Mohendra Nath Mukhoti, Additional Munsiff of Patiya, dated the 14th December, 1907.

(1) (1889) I. L. B. 16 Cal. 104.

CIVIL.

1907.

Ram Prasad
v.
Pawan Singh.

CIVIL.

1918.

June, 17.

CIVIL.

1918.

Faisur Rahman
v.
Mimansa Khatun.

had been sold away for arrears of revenue. The ground on which the plaintiff claimed as against the defendants in two appeals was that the defendant No. 1 in Letters Patent Appeal No. 27 of 1911 who was a defaulting sharer with the plaintiff, could only hold the property purchased by him at the revenue sale subject to a trust in favour of the plaintiff to the extent of her share and in Appeal No. 28 of 1911, that the defendants Nos. 2 and 3 were merely *benamdars*. The Court of first instance gave the plaintiff a decree for possession in respect of some of the properties holding that the others did not belong to her father. On appeal by some of the defendants, the first appellate Court dismissed the plaintiff's suit with respect to the subject-matter of the appeals before him. The plaintiff then appealed to the High Court. The appeal then came on for hearing before Mr. Justice N. R. Chatterjee on the 8th February, 1911.

Maulvi Syed Shamsul Huda and Babu Sasadhar Roy for the Appellant.

Maulvi Serajul Islam for the Respondent.

The following judgment was delivered by

1911.

February, 8.

N. Chatterjee J.—The plaintiff appellant sued to recover possession of her share in certain properties inherited by her from her father and mother and which had been sold away for arrears of revenue or rent. She alleged that the defendant No. 1 who is her brother managed the whole estate on behalf of all the co-sharers and that she was in possession jointly with him by receiving her share of the rents and profits that after she had fallen out with defendant No. 1 the latter did not pay her share of the rents and profits nor give up her share of the properties and that in order to deprive her of her share caused the properties to be sold for arrears of revenue and himself purchased the same with his own money in the names of the defendants 10-13 but that all the properties were in his possession.

The defendant No. 1 pleaded *inter alia* that the plaintiff was never in possession that the suit was barred by limitation that he had purchased two of the properties and that some of the other properties were purchased by some of the other defendants. The latter set up their respective purchases and pleaded that they were not *benamdars* of the defendant No. 1.

The Court of first instance gave the plaintiff a decree for possession in respect of some of the properties holding that the others did not belong to her father.

Some of the defendants appealed in respect of some of the properties.

The learned Subordinate Judge on appeal dismissed the plaintiff's suit with respect to the subject-matter of the appeals before him.

The plaintiff has appealed to this Court, and it has been contended on her behalf, *first*, that the defendant No. 1 was under an obligation to pay the Government revenue and that the purchase made at the sales after committing default in payment of revenue or rent could not affect plaintiff's rights and that the plaintiff was entitled to recover her share of the properties, and, *second*, that the learned Subordinate Judge is wrong in holding that the plaintiff could not contend that the properties purchased by the defendants 10 to 12 were really purchased by the defendant No. 1 merely because the latter denied having any right to them.

With regard to the first contention, it appears to me that the learned Subordinate Judge has not properly tried the question, and has not found all the facts necessary for the decision of the question. He states in his judgment, "so it appears from her statement that she was a grown up woman fit to manage her property when her father died. Defendant No. 1 appears to be either younger or older than her by a few years only. Hence there can be no reason to hold that she would leave the management of her property with her brother after the death of her mother, if she were at all in possession of it or claimed it. But she says that she had been all along in possession of the property by receipt of its usufruct. If this be true, it was her duty to pay the share of the revenue or the entire revenue payable for the property, to save it from sale. But there is nothing to show that she ever paid any revenue or made any payment for it to defendant No. 1."

"Under any circumstances it does not appear that defendant No. 1 was under any obligation to her to pay her share of the revenue. There were many co-sharers. There is nothing to show that the defendant No. 1 had any obligation to pay their share of the revenue. It was quite optional with the defendant No. 1 to pay the revenue or not. Further it appears that all the sales except one took place after the brother and the sister had fallen out with each other. Such quarrel must have led plaintiff to know that defendant No. 1 would do nothing for her benefit, if such an act was ever before done by him, as a self-imposed task and without any obligation to her."

CIVIL.

1918.

Fakir Rahman

Mitman Khatun,

N. Chatterjee, J.

CIVIL.

1918.

Faisur Rahman

v.

Mimansa Khatun.

N. Chatterjee, J.

"Therefore if the property had been sold for arrears of revenue defendant No. 1 could not be held guilty of any act of fraud."

He has not however decided whether the plaintiff was in possession nor has he found for whose default the sales took place.

If the plaintiff was in possession of her share of the properties and used to get the rents and profits in her share and did not pay her share of the revenue or rent, she has no ground whatever for claiming her share of the properties if they were sold for arrears of revenue or rents and purchased by the defendant No. 1 in his own name or in the *benami* of others. If on the other hand she was not in possession of her share since her mother's death which it appears took place only 10 years before the suit and the defendant No. 1 kept her out of possession, enjoyed the rents and profits of the properties of her share and in order to deprive the plaintiff of her share of the properties he committed default in paying revenue or rent and purchased the properties in his own name or in the names of other persons, such purchases cannot I think affect the plaintiff's title and she is entitled to recover her share of the properties. A similar view was taken in the case of *Chunder Nath v. Tirthanund Thakoor* (1) where the learned Judges observed as follows: "Now it seems clear that if the plaintiff succeeded in proving that the principal defendant's father had committed default in the payment of Government revenue with the view of bringing the property to be purchased in the name of Sib Persaud for his own benefit, that would be such a fraud as would entitle plaintiff to the assistance of the Court, and the property ought to be reconveyed to the plaintiff," and "the fraud in question is merely a part of the machinery by which, if the plaintiff's case is true, the defendants have kept the plaintiff out of possession of a property to which he became entitled at the death of the widow Annapoorna." In that case the arrears fell due at a time when the plaintiff had become the rightful owner of the property but had been kept out of possession of the property by the defendant's father.

The learned pleader for the respondent relied upon the case of *Doorga Singh v. Sheo Pershad Singh* (2) where it was held that the right of a co-sharer to buy up an estate at a revenue sale was not based upon any right or interest common to himself and his co-sharers and that in the absence of misrepresentation

(1) (1878) I, L. B. 8 Calo 504 (506, 507). (2) (1889) I, L. B. 18 Calo, 194.

or concealment of the fact that he had intentionally defaulted did not constitute fraud and the learned Judges observed as follows : "Every co-sharer in a zemindari may, if he chooses, bring it to sale by not paying the revenue ; but every other co-sharer can save it from sale by paying the arrear, and can recover the amount from the defaulter. The fact of the defendants being co-sharers in the property, did not clothe them with any fiduciary character which disqualified them from buying this property, unless it was for the benefit of all the co-sharers."

The view taken in the above case *viz.*, that the fact of the defendants being co-sharers in the property did not clothe them with any fiduciary character has been questioned in two unreported cases. In *Chowdhury Ram Prashad v. Chowdhury Pawan Singh* (1) the learned Judges observed as follows : "We agree with the learned Advocate-General that it is not possible to hold that a co-sharer is under a legal obligation to his co-sharers to pay in his share of the Government Revenue but we think that in that case (cited above) Mr. Justice Banerjee went too far when later in his judgment he says that the fact that the defendants having been co-sharers with the plaintiffs did not clothe them with any fiduciary character at all. We think that if the terms fiduciary character be used in its broadest sense this goes too far, for we consider that it is not possible to hold that between co-sharers in a joint estate all being liable to pay their *quota* of the Government revenue according to their respective shares no relation of mutual confidence exists, otherwise the position of co-sharers in a revenue paying estate if they were always open to be overreached and deceived by their co-sharers, would be intolerable." A similar view was also taken by Holmwood and Digambar Chatterjee JJ., in *Fanki Singh v. Debi Nandan Prasad* (2).

The actual decision in the above three cases turned upon facts which are different from those of the present. It is not necessary however to decide in the present case which of the above two views is correct. In all those cases all the co-sharers were in possession and the question arose whether one co-sharer who commits default in paying his *quota* of the revenue and purchases the property himself commits any fraud on his other co-sharers.

In the present case if the defendant No. 1 kept the plaintiff out of possession of the properties, appropriated the rents and

(1) (1907) 18 O. L. J. 97.

(2) (1910) 18 O. W. N. 776.

* CIVIL.

1918.

Faisur Rahman

Mimansa Khatun.

N. Chatterjee, J.

CIVIL.

1918.

Faisur Rahman
 &
 Mimanee Khatun.
 N. Chatterjee, J.

profits and wilfully defaulted to pay the Government revenue in order to deprive her of her share and purchased them himself I think the sale would not affect her rights and the defendant No. 1 would be bound to reconvey her share of the properties to her. But the reconveyance will be conditional on plaintiff's paying her proportionate share of the purchase money, the defendant No. 1 accounting for the profits of the properties for the period the plaintiff was kept out of possession. If however any of the sales took place owing to the default committed by the co-sharers other than the defendant No. 1 in respect of any property and if the latter was not in charge of their shares I think that plaintiff's suit would fail in respect of such properties.

With regard to the second contention I think that the lower appellate Court is wrong in holding that the plaintiff cannot contend that the properties were purchased by the defendant No. 1 merely because the latter denied having any right in them. The plaintiff can certainly show that the alleged purchasers were merely *benamdar*s for the defendant No. 1 who purchased in their names, in order to deprive the plaintiff of her share of the properties. The learned Subordinate Judge ought to have come to a finding upon the said point on the evidence. If it is found that the defendant No. 1 purchased the properties in the *benami* of the other defendants the consequences will be the same as in the case of purchase made by the defendant No. 1 in his own name.

The case is accordingly remanded to the lower appellate Court for rehearing of the appeal in accordance with the observations made in this judgment. Costs to abide the result. •

Against this order of remand, the defendants preferred appeals under section 15 of the Letters Patent.

Babus Harendra Narayan Mitra and *Jyotis Chandra Sircar* for the Appellants in Appeal No. 27.

Babu Probodh Chandra Das for the Appellant in Appeal No. 28.

Moukri Nuruddin Ahmed and *Babu Khitis Chandra Sen* (for *Babu Sasadhar Roy*) for the Respondent.

The judgment of the Court was delivered by

June, 17.

Jenkins C. J.—This is an appeal under clause 15 of the Letters Patent from a decision of Mr. Justice Naliniranjan Chatterjee. He has not finally decided the rights of the parties, but has remanded the case, because it appeared to him that the treatment of the case by the lower appellate Court was unsatis-

factory. Stated shortly the case is this. The plaintiff claims a share in land and claims that share notwithstanding that there has been a revenue sale which apparently extinguished her title. The ground on which the plaintiff claims as against the appellants in the two appeals before us, is that the appellant in appeal No. 27 of 1911, defendant No. 1, a defaulting sharer with the plaintiff, can only hold the property purchased by him at the revenue sale subject to a trust in favour of the plaintiff to the extent of her share. As against the appellants in appeal No. 28, that is, defendants Nos. 2 and 3, it is claimed that they are merely *benam-lars* for defendant No. 1.

The Munsiff affirmed the plaintiff's claim and passed a decree in her favour, whereby in effect he declared the plaintiff's title to a share in the land, awarded the plaintiff *khas* possession of *khas* lands and possession through tenants of tenanted lands, and also decreed *wasilat*.

The lower appellate Court reversed that decree and Mr. Justice Chatterjee, before whom the case came on appeal, was, as I have indicated, dissatisfied with the treatment of the case by the lower appellate Court.

The gist of Mr. Justice Chatterjee's judgment is that where a revenue sale is caused by the default of a co-owner and the property is afterwards purchased at that revenue sale by that co-owner, there may be such relations between the defaulter and his co-owner as would make it right for the Court to treat such a sale as made for the benefit of both. He indicated in his judgment certain conditions under which, in his opinion, some such right would arise. Doubtless, he did not intend that to be an exhaustive list of the circumstances that would lead to such a result, nor is it our purpose to indicate at this stage what the circumstances are that may lead to such a result. But we hold that there may be such circumstances and that in this case there may be circumstances which would make the decree passed by the Munsiff a right and proper decree. We have been confronted with the decision in *Doorga Singh v. Sheo Pershad Singh* (1) and also a decision of the Court of Appeal in England in *Biss v. Biss* (2) as well as a decision of the House of Lords in *Kennedy v. De Trafford* (3), all of which no doubt do give colour to the view that ordinarily there is no fiduciary relation between co-tenants. So far as the English cases are concerned, they

CIVIL

1918.

Fakir Rahman
v.
Mimansa Khatun.
Jenkins, C. J.

(1) (1889) I. L. R. 16 Cal. 194.

(2) (1908) 2 Ch. 40 (57).

(3) (1897) App. Cas 180.

CIVIL.

1918.

Faisur Rahman

v.
Mimansa Khatun.

Jenkins, C. J.

hardly would be a safe guide for us to follow in this country, because the relations that exist between co-tenants in England and the consequences of those relations are very different from those which obtain in this country. But no doubt every respect is due to the decision in *Doorga Singh v. Sheo Pershad Singh* (1), though it has to be borne in mind that two benches of this Court have in two unreported decisions [*Chowdhury Ram v. Chowdhury Pawan* (2); *Fanki v. Debi* (3)] questioned the accuracy of the law as laid down in *Doorga v. Sheo Pershad* (1) if pushed to its extreme limits. It has been indicated and, doubtless, is true that the rule which the plaintiff seeks to invoke and enforce in this case is one resting on public policy, and what may be excellent public policy in England may not be such excellent public policy for India, and *vice versa*. Now, we do find as a matter of fact that the Legislature in India has dealt with this matter in the Trusts Act in a manner which wholly disagrees with the view of public policy taken in the English cases to which we have been referred. Thus in section 90 we have a provision in regard to the advantages gained by a qualified owner, and it is there enacted that where a qualified owner of any property avails himself of his position as such and gains an advantage in derogation of the rights of other persons interested in the property, he must hold, for the benefit of all persons so interested, the advantage so gained. Qualified owners are not limited to tenants for life or mortgagees but include expressly co-owners, and there is a specific illustration to that section which shows the way in which a co-owner may be affected by this rule. I do not say that the Trust Act applies here: But it is useful as indicating what is the rule of public policy in India in the view of the Legislature, and it must be borne in mind that though the Act does not at present apply, it may be made applicable to this Presidency, if thought fit. All this shows that there may be circumstances in which public policy in this Presidency would demand that a co-owner should hold an advantage which he has obtained in derogation of the rights of other persons interested in the property, for their benefit as well as his own. Whether or not the doctrine governs the rights of parties in particular cases must depend upon facts as found, and it is for that reason that Mr. Justice Chatterjee has refused to accept the judgment of the lower appellate Court and considered that the case had not been adequately treated. There

(1) (1889) I. L. B. 18 Cal. 194.

(2) (1907) 18 C. L. J. 97.

(3) (1910) 15 C. W. N. 776.

is an obvious illustration of this furnished by the judgment.— I refer to that passage where the learned Judge says of the plaintiff that she had declared that she had been all along in possession of the property by receipt of its usufruct and then goes on to say "If this be true, it was her duty to pay the share of the revenue payable for the property to save it from sale." He should have found as a fact what the position was and not have based the conclusion on an assertion by the lady which was denied by her opponent: and, similarly, it would be wrong to accept as correct, even from a legal point of view, the reasoning of the learned Judge as to the relations between defendant No. 1 and the alleged *benamdar*. For these reasons, I think that Mr. Justice Chatterjee was perfectly justified in the course he took. There must be a clear finding on all material facts, and when I say this, I bear in mind what has been said to us by the appellant, defendant No. 1, that a part of his case has not been discussed at all by the lower appellate Court. If that be so, then obviously it must be considered and discussed on this further hearing of the appeal, if it become necessary and relevant. It will be now for the lower appellate Court, to which this case must go in accordance with the judgment of Mr. Justice Chatterjee, to determine, not as suppositions but as actual facts, all that is relevant to this case on the materials upon the record, and having determined those facts, to apply the appropriate law to them in the light of the remarks which have been made.

In this view of the case we must dismiss the appeal with costs.

There will be the same order in appeal No. 28.

A. T. M.

Appeals dismissed.

APPELLATE CRIMINAL.

*Before the Hon'ble Robert Fulton Rampini, Acting Chief Justice,
and Mr. Justice Doss.*

CHINTAMON SINGH

v.

KING-EMPEROR.*

Leave to appeal to Privy Council—Order passed by High Court in Criminal revision—Criminal Procedure Code (Act V of 1898), Sec. 118—Calcutta Letters Patent (1865), Cl. 41.

No appeal lies under clause 41 of the Calcutta Letters Patent to His Majesty in Council against an order passed by the High Court on the Appellate Side, under section 118 of the Code of Criminal Procedure under

* Application for leave to appeal to His Majesty in Council No. 28 of 1908, against an order of Rampini and Sharfuddin JJ. dated 20th December, 1907, affirming that of F. Roe, Esq., Sessions Judge of Hoogly, dated 20th April 1907.

CIVIL.

1912.

Faisur Rahman,
P.
Mimansa Khatun,
Jenbias, O. J.

CRIMINAL.

1908.

August, 11,

CRIMINAL.

1908.

Chintamon Singh
v.
King-Emperor.

which the petitioner was bound down to be of good behaviour for a period of three years and was required to execute a bond with two sureties.

This was an application for leave to appeal to His Majesty in Council against an order of this Court confirming an order of the Court below under section 118 of the Criminal Procedure Code in the matter of *Chintamon Singh v. Emperor* (1). At the hearing of the application, a preliminary objection was taken on behalf of the Crown that the Court had no jurisdiction to grant leave to appeal to His Majesty in Council in a criminal matter decided on the Appellate Side.

Mr. P. L. Roy and *Moulvi Muhammad Mustafa Khan* for the Petitioner.

Mr. Norton for the Opposite Party.

The judgment of the Court was delivered by

August, 11.

Rampini C. J.—This is an application for leave to appeal to His Majesty in Council. The order against which it is proposed to appeal is one passed under section 118 of the Code of Criminal Procedure under which the petitioner was bound down to be of good behaviour for a period of three years and was required to execute a bond for Rs. 500 with two sureties for Rs. 500 each. The date of the order is 12th July 1906, so the three years will expire on the 12th July 1909 and therefore more than 2 years has expired.

We have asked the learned Counsel for the petitioners to explain under what section and what law he is entitled to ask us to grant this application. He refers to section 41 of the Calcutta Letters Patent. In that section it is laid down that "from any judgment, order or sentence of the High Court of Judicature at Fort William in Bengal, made in the exercise of its original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal." But this is not a case in which any judgment, order or sentence has been passed by the High Court, nor is it a criminal case where any point or points of law have been reserved for the opinion of the High Court.

It appears to us that no appeal lies and we must reject this application which we accordingly do.

A. T. M.

Leave to appeal refused.

(1) (1907) I. L. R. 85 Calo. 243, 7 C. L. J. 177, 12 O. W. N. 299.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.*

ATAUR SINGH AND OTHERS

v.

KING-EMPEROR.*

*Leave to appeal to Privy Council—Decision of third Judge on reference—
Calcutta Letters Patent, 1885, Cl. 41.*

CRIMINAL.

1918.

June, 4.

Leave to appeal to Privy Council from a decision of a third Judge in a criminal case on a reference arising from difference of opinion of two Judges of the High Court, being one not coming under clause 41 of the Calcutta Letters Patent, refused.

Application for leave to appeal to His Majesty in Council by the Accused.

This was an application for leave to appeal to the Judicial Committee against the decision of the High Court in a criminal appeal. The case was heard in the first instance by Stephen and D. Chatterjee, JJ. Stephen J. held that the sentences of death passed upon the appellants should be confirmed. D. Chatterjee J. held that the appellants should be acquitted. The case was then referred to Carnduff J. who agreed with Stephen J. that the guilt of the appellants had been established, but he held that the sentence ought to be one of transportation for life. The accused thereupon applied for leave to appeal to His Majesty in Council. [The application was contrary to the rule laid down in *Chintamon v. King-Emperor* (1).]

Babu Jogendra Narain Majumdar for the Petitioner.

No one for the Crown.

The judgment of the Court was delivered by

Jenkins C. J.—We reject the applications, not because we express any opinion on the merits, but because our only powers to grant leave is under clause XLI of the Letters Patent and the present case does not come within that clause.

June, 4.

A. T. M.

Leave refused.

* Application for leave to appeal to Privy Council No. 23 of 1913 from the decision of Stephen, Carnduff and D. Chatterjee, JJ., in Criminal Appeal No. 697 of 1912 and Reference No. 21 of 1912.

(1) (1908) 18 O. L. J. 119.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.*

KHIRODAMOYEE DASI AND OTHERS

v.

PRODYOT KUMAR ADDYA AND OTHERS.*

CIVIL.

1918.

June, 17.

Document, printing of—Exclusion—Privy Council appeal—Irrelevant to subject-matter of appeal—High Court Rules, Appellate Side, Rule 17.

Where the only point in appeal to His Majesty in Council was whether the High Court was competent to hear on the merits the appeal against the preliminary decree though no appeal had been preferred against the final decree :

Held, that the appellant was entitled to exclude from the record all documents that were not relevant to the subject-matter of the appeal to His Majesty in Council.

Application by the Appellant.

This was an application by the appellants to England for exclusion from the record of such papers as were not necessary for the purposes of appeal. The suit was instituted for properties claimed as joint family properties. The preliminary decree was made on the 29th March 1910 by which part of the claim was allowed. The plaintiffs thereupon appealed to the High Court. During the pendency of the appeal a final decree was made by the original Court on the basis of the preliminary decree. When the appeal against the preliminary decree came to be heard by the High Court, a preliminary objection was taken that the appeal was incompetent because no appeal had been preferred against the final decree. The preliminary objection was allowed and the appeal was dismissed as incompetent. The appellants thereupon applied for leave to appeal to His Majesty in Council against the decree of dismissal made by the High Court. Leave was granted on the 13th May 1913. On the 21st May 1913 an estimate of cost of preparation of paper book was served upon the vakils for the appellants. The appellants contended that a large proportion of the papers included in the list was wholly unnecessary for the purposes of the appeal to His Majesty in Council, because the only point in the appeal was whether the High Court was competent to hear on the merits the appeal against the preliminary decree, though no appeal had been preferred against the final decree. The Respondents

* *In re* an application for leave to appeal to His Majesty in Council No. 19 of 1912.

contended that under the rules of the Court, all the papers on the record had to be included in the paper book in the same manner as if the appeal to the High Court had been dismissed on the merits. The matter was then set down for argument.

Babu Amarendranath Bose for the Appellants.

Babu Mahendranath Ray and *Mr. G. Sarcar* for the Respondents.

The judgment of the Court was delivered by

Jenkins, C. J.—The application made by the petitioner to England appears to us to be in accordance with the spirit of Rule 17 of the rules of the High Court, Appellate Side, which calls upon the Registrar as well as the parties and their agents to exclude from the record all documents that are not relevant to the subject-matter of the appeal.

The question in the appeal in this case is, whether the case should have been heard on the merits in the High Court; and all the applicant before us desires is that he should be heard by the High Court, and therefore it is irrelevant to include the documents that relate to the merits. We therefore grant the prayer of the applicant. Having regard to the opposition that was put in, we allow costs, two gold mohurs.

The applicant is allowed six weeks time from this date to put in the amount of the fresh estimate.

A. T. M.

Application granted.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice,
and Sir Asutosh Mookerjee, Knight, Judge.*

RAM SOSHI RAY AND OTHERS

v.

C. E. GREY, OFFICIAL TRUSTEE AND EXECUTOR TO THE
ESTATE OF LATE MANIK LAL SEAL.*

Leave to appeal to Privy Council—Appeal, if Yes—Decree in apportionment case—Land Acquisition Act (I of 1894), Sec. 54.

No appeal lies to His Majesty in Council against a decree in an apportionment case under the Land Acquisition Act.

The Rangoon Botatung Company, Limited v. The Collector, Rangoon (1) followed.

Application for leave to appeal to His Majesty in Council.

* Application for leave to appeal to Privy Council No. 48 of 1912, against the decision of Sir Cecil Brett, Knight, Judge, and Mr. Justice Sharfuddin in Appeal from Original Decrees Nos. 421 and 481 of 1909 against the decrees of W. Delyingna, Esq., District Judge of Hooghly, dated the 4th August, 1909.

(1) (1912) 16 O. L. J. 245, I. L. R. 40 Cal. 21, 16 O. W. N. 961.

CIVIL

1912.

Khironamoyee Dasi

Prodyot Kumar.

CIVIL

1912.

May, 27.

CIVIL.

1918.

Bam Soshi

O. E. Grey.

This was an application for leave to appeal to His Majesty in Council against a decree of the High Court in an apportionment case under the Land Acquisition Act. On behalf of the appellant it was argued that an appeal in an apportionment case stands on a different footing from an appeal in a valuation case under the Land Acquisition Act. On behalf of the respondent it was argued that there was no difference in principle in the two classes of cases, because the decision of the Court in each instance was embodied in the award from which, according to the decision of the Judicial Committee, no appeal lay to the Privy Council.

Babu Baidya Nath Dutt for the Petitioner.

Babu Sarashi Charan Mitra for the Opposite Party.

The judgment of the Court was delivered by

May, 27.

Jenkins, C. J.—It appears to us that in view of the decision of the Privy Council in the case of *The Rangoon Botatoung Company, Limited v. The Collector, Rangoon* (1), no appeal lies. We therefore do not think it is in our power to grant leave to appeal.

The application is refused with costs, five gold mohurs.

A. T. M.

Leave refused.

(1) (1912) 16 O. L. J. 215, 16 O. W. N. 981.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.*

KRISHNA CHANDRA GHOSH AND OTHERS

v.

MAHARAJA RAM NARAIN SINGH BAHADUR

AND OTHERS.*

CIVIL.

1918.

May, 27.

Leave to appeal to Privy Council—Interlocutory order—Order not deciding rights of parties—Order of remand—Final order—Civil Procedure Code (Act V of 1908), Sec. 109—Suit, frame of, not bad.

An order deciding that the suit as framed was not barred under section 91 of the Ohta Nagpur Tenancy Act and remanding the case for trial on the merits, is not a final order, within the meaning of section 109 of the Code of Civil Procedure and hence no appeal lies to His Majesty in Council.

Applications for leave to appeal to His Majesty in Council by the Defendants..

* Applications for leave to appeal to Privy Council Nos. 12 to 15 of 1918 against the decision of Sir Asutosh Mookerjee, Knight, Judge and Mr Justice Holmwood in Appeals from Original Decrees Nos. 52 to 55 of 1911 against the decrees of Babu Sarat Chandra Pal, Subordinate Judge of Hazaribagh, dated the 14th November, 1910.

This was an application for leave to appeal to the Judicial Committee against the decision of this Court in the case of *Ram Narain Singh v. Lachmi Narain Deo* (1). On behalf of the appellant it was contended that inasmuch as the decree of dismissal made by the Court of first instance had been set aside by the High Court, the order of the High Court though it remanded the suit for trial on the merits was a final order against which an appeal lay to the Judicial Committee. *Saratmani Debi v. Bata Krishna Banerjee* (2). On behalf of the Respondent it was argued that the decision of the High Court had not decided any question relating to the rights in controversy between the parties, and that consequently the order of remand was essentially an interlocutory order from which no appeal lay to the Privy Council. *Secretary of State for India v. British India Steam Navigation Co.* (3) and *Srinivasa Prasad Singh v. Kesho Prasad Singh* (4).

Babu Monmatha Nath Mukherjee for the Petitioner.

Babu Provas Chandra Mitter for the Opposite Party.

The judgment of the Court was delivered by

Jenkins, C. J.—It is suggested in this case, that there is a final order from which an appeal will lie. Having regard to the circumstances of the case, it appears to us that there is no order which is final within the meaning of section 109 of the Code of Civil Procedure.

The application for leave to appeal is refused with costs, two gold mohurs.

This order will also govern applications for leave to appeal Nos. 13 to 15 of 1913, which are also refunded with costs, two gold mohurs in each case.

A. T. M.

Leave refused.

(1) (1912) 17 O. L. J. 239, 17 O. W. N. 403. (3) (1911) 18 O. L. J. 90, 15 O. W. N. 848.

(2) (1907) 10 O. L. J. 386.

(4) (1911) 18 O. L. J. 681.

CIVIL RULE.

Before Sir Asutosh Mookerjee, Knight, Judge, and

Mr. Justice Beachcroft.

PARBATI

v.

TULSI KOERI.*

Bengal Tenancy Act (VIII of 1885), Sec. 108, scope of—Cohsoni and ex parte decree—Revenue Officer's power to revise—Appeal.

The terms of section 108 of the Bengal Tenancy Act are very comprehensive.

* Civil Rule No. 2582 of 1911, against the decision of P. W. Murphy, Esq., Settlement Officer of Monghyr, dated the 28th April, 1910, setting aside that of Moula Osman Ali, Assistant Settlement Officer of Monghyr, dated the 9th September, 1909.

CIVIL.

1913.

Krishna Chandra

v.
Ram Narain.

May, 27.

CIVIL

1913.

February, 27.

CIVIL.
 1918.
 Parbati
 Tuli Koeri.

sive and the Legislature has not prescribed any restriction as to the class of questions which may be considered by the specially empowered revenue officer or as to the mode in which his jurisdiction is to be exercised. A specially empowered revenue officer is invested under section 108 with what may be described as power to review on the merits his own order or revise the orders made by another officer. If he reconsiders an order made by himself, he exercises a power of review; if, on the other hand, he examines the propriety of an order made by another revenue officer, he exercises revisional powers.

Where consent decrees have been made or decrees have been made *ex parte* against absent defendants, their propriety is liable to be examined by an officer specially empowered in that behalf under section 108 of the Bengal Tenancy Act.

An order under section 108 of the Bengal Tenancy Act is liable to be challenged by way of appeal under sub-section (2) of section 109A.

Application for revision by the Plaintiffs.

Suit under section 106 of the Bengal Tenancy Act for declaration that they were occupancy raiyats and not tenure-holders as entered in the record of rights, against their superior landlords, as also against under-tenants. A compromise was entered into between the plaintiffs and their landlords and some of the under-tenants; the other under-tenants were not represented. The Assistant Settlement Officer after considering the case on the merits, made a decree which was a consent decree in respect of the defendants who were parties to the compromise and an *ex parte* decree as regards the absent defendants. Subsequently, a Settlement Officer specially empowered under section 108, called for the records, and upon an examination of the papers came to the conclusion that the enquiry by the Assistant Settlement Officer had not been satisfactory. He thereupon set aside the decree of the Assistant Settlement Officer and remanded the case for retrial. The question was whether the Settlement Officer had jurisdiction to remand the case.

Babus Ram Charan Mitra and *Jogendra Nath Mukherji* for the Petitioner.

Babu Bepin Behary Ghose for the Opposite Party.

The judgment of the Court was delivered by

February, 27.

Mookerjee J.—We are invited by the plaintiffs in a suit under section 106 of the Bengal Tenancy Act to set aside an order made by a Settlement Officer under section 108 on the 28th April 1910, which cancels a decree made by an Assistant Settlement Officer on the 9th September 1909 and remands the case for retrial. It appears that the plaintiffs instituted this suit for declaration that they were occupancy raiyats and not tenure-holders as entered in the record of rights. The declaration was

CIVIL.

1918.

Parbati

v.

Tulsi Koerl.

Mookerjee, J.

sought against their superior landlords, as also against their under-tenants. When the suit came on for trial, a compromise was made as between the plaintiffs on the one hand and their landlords and some of the under-tenants on the other; the other under-tenants were not represented, and did not join in the compromise. The Court considered the case on the merits, and ultimately made a decree, which was a consent decree in respect of the defendants who were parties to the compromise and an *ex parte* decree as regards the absent defendants. Subsequently, a Settlement Officer specially empowered under section 108, called for the records, and upon an examination of the papers came to the conclusion that the enquiry by the Assistant Settlement Officer had not been satisfactory. He thereupon set aside the decree of the Assistant Settlement Officer and remanded the case for retrial. It has been argued before us that this order was made without jurisdiction, *first*, because the revenue officer was competent only to correct what has been described as arithmetical or clerical errors, or, errors patent on the face of the record; and *secondly*, because the revenue officer was not competent to direct a fresh investigation upon the merits. In our opinion, these contentions are not well-founded.

Section 108 provides that any revenue officer, specially empowered by the Local Government in this behalf, may, on application or of his own motion, within twelve months from the making of any order or decision under section 106, revise the same, whether it was made by himself or by any other revenue officer, but not so as to affect any order passed or decree made under section 109A, provided that no such order shall be so revised if an appeal from it is pending under section 109A, or until reasonable notice has been given to the parties concerned to appear and be heard in the matter. It is worthy of note that the terms of this section are very comprehensive and that the Legislature has not prescribed any restriction either as to the class of questions which may be considered by the specially empowered revenue officer or as to the mode in which his jurisdiction is to be exercised. A specially empowered revenue officer is invested, under section 108, with what may be described as power to review on the merits his own order or revise the orders made by another officer. If he reconsiders an order made by himself, he obviously exercises a power of review; if, on the other hand, he examines the propriety of an order made by another revenue officer, he exercises revisional powers. Cf.

CIVIL.

1918.

Parbati

v.

Tulsi Koeri.

Mookerjee, J.

Raj Mohan v. Alam Gazi (1). The policy which underlies this legislative provision, is not difficult to appreciate. Section 109A makes provision for an appeal to the special Judge from a decision in a suit under section 106. But no such appeal can be preferred, where a decree has been made by consent of parties : *Biraj Mohini v. Chinta Moni* (2) ; *Gulab Koer v. Badshah Bahadur* (3)* ; nor is there the possibility of an appeal where the decree has been made *ex parte* against an absent defendant. The legislature may well have thought that where consent decrees have been made or decrees have been made *ex parte* against absent defendants, their propriety should be liable to be examined by an officer specially empowered in that behalf. Section 147A, it may be observed, indicates a class of cases where an enquiry of this character may possibly be necessary. We are clearly of opinion that a restricted interpretation should not be placed upon the terms of section 108. In the case before us, there is no reason to hold that the revenue officer has exceeded his jurisdiction in the exercise of his powers under section 108, and no ground has been established to justify our interference. We may add that an order under section 108 is liable to be challenged by way of appeal under sub-section (2) of section 109A ; the petitioner has not availed himself of that remedy.

The result is that this Rule is discharged, but there will be no order for costs.

A. T. M.

Rule discharged.

(1) (1912) 18 O. L. J. 839.

(2) (1901) 5 O. W. N. 877.

(3) (1909) 10 O. L. J. 430 (438).

[* See also *Bakhal Moni v. Adwytia Prasad*. (1903, I. L. R. 30 Cal. 618—Rep.)]

APPELLATE CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

PARBATI

v.

TULSI KOERI.*

CIVIL.

1918.

February, 27.

Appeal, if lies—Suit, dismissal of—Formal decree drawn up—Civil Procedure Code (Act V of 1908), O. LX, R. 8.—Law, change of—Bengal Tenancy Act (VIII of 1885), Sec. 107—Decision.

The fact of a decree being drawn up in a suit which was dismissed for

* Appeal from Appellate Decree No. 1087 of 1911, against the decision of J. O. Twidell, Esq., Special Judge of Bhagulpur, dated the 16th January, 1911, affirming that of Babu Sures Chandra Bhakravarti, Assistant Settlement Officer, of Monghyr, dated the 3rd August, 1910.

default, cannot alter the nature of the order which depends upon the circumstances under which it was made.

The Court, when it has to pass an order under Order IX, Rule 8 of the Code of Civil Procedure, should not receive evidence on behalf of the defendant nor should examine the case on the merits.

The order of dismissal for default under Order IX, Rule 8 of the Code of Civil Procedure, not being a decree, cannot be challenged by way of appeal. The Code of Civil Procedure of 1908 has, in this respect, altered the pre-existing law.

Rukmininayee Dasi v. Paran Chandra Bhara (1) followed.

The term 'decision' in section 107 of the Bengal Tenancy Act implies an adjudication on the merits and does not include an order of dismissal of a suit for default.

Appeal by the Plaintiff.

Suit under section 106 of the Bengal Tenancy Act.

In the absence of the plaintiff, the Court, after receiving evidence of the defendants and expressing an opinion on the merits of the case, dismissed the suit for default under Order IX Rule 8 of the Code of Civil Procedure. A formal decree was drawn up. The plaintiff appealed to the Special Judge, who dismissed it as being incompetent. The plaintiff appealed to the High Court. The question was, whether appeal to the Special Judge was competent.

Babus Ram Charan Mitra and *Jogendra Nath Mukherjee* for the Appellant.

Babu Bipin Behary Ghose for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal against an order by which the Court of appeal below has dismissed an appeal as incompetent. The appellant was the plaintiff in a suit under section 106 of the Bengal Tenancy Act, which was dismissed for default on the 13th August 1910. The Court, in the absence of the plaintiff, received the evidence of the defendants, expressed an opinion on the merits of the case, but ultimately made an order of dismissal for default under Rule 8 of Order 9 of the Code of 1908. The plaintiff did not apply under Rule 9 for restoration of the suit, but preferred an appeal to the Special Judge who dismissed the appeal on the 16th January 1911. We are now invited to set aside this order and to hold that the appeal was competent, inasmuch as the Court of first instance had recorded the evidence of the defendants and had drawn up a

CIVIL

1918.

Parbati

Tulsi Koeri.

February, 27.

CIVIL.

1918.

Parbat

Tala! Koer!

Mookerjee, J.

formal decree. We are of opinion that there is no substance in this contention.

The order, on the face of it, purports to have been made, and could only have been made, under Rule 8 of Order 9. As was pointed out by Jackson J. in *Buldeo Misser v. Syud Ahmed* (1) and by Couch C. J. in *Mohesh Chunder v. Thakoor Dass* (2), the Court should not have received the evidence on behalf of the defendants nor should the merits have been examined; it was also unnecessary to draw up a formal decree. The fact that the decree was drawn up obviously cannot alter the nature of the order, which must depend upon the circumstances under which it was made. Now it is clear that under section 2 of the Code of 1908, this order of dismissal for default is not a decree, and is not liable to be challenged by way of appeal. As was pointed out by this Court in the case of *Rukminimayi Dasi v. Paran Chandra Bhera* (3), the Code of 1908 has, in this respect, altered the pre-existing law. But much stress has been laid upon section 107 of the Bengal Tenancy Act, which, it has been argued, controls the effect of section 2 of the Civil Procedure Code. In our opinion, section 107 does not assist the appellants. That section merely provides that a suit under section 106 is to be tried in accordance with the procedure laid down in the Civil Procedure Code for trial of suits and that the *decision* in every such proceeding shall have the force and effect of a decree of a civil Court in a suit between the parties. The term 'decision' plainly implies an adjudication on the merits and does not include an order of dismissal of the suit for default. The conclusion follows that the appeal presented to the Special Judge was incompetent, and has been rightly thrown out. The present appeal consequently fails and is dismissed with costs. We assess the hearing fee at one gold mohur.

A. T. M.

Appeal dismissed.

(1) (1871) 15 W. R. 148. (2) (1878) 20 W. R. 425.

(3) (1910) I. L. R. 39 Calo. 841; 15 C. L. J. 884.

*Before Sir Asutosh Mookerjee, Knight, Judge,
and Mr. Justice Beachcroft*

AFTAB CHOWDHURY AND OTHERS

v.

ASOKHADEEN.*

CIVIL

1918.

March, 13.

Easement—Dominant and servient owners—Servient owner, if can compel dominant owner to continue easement right.

An easement exists for the benefit of the dominant tenement alone, and the servient owner acquires no right to insist on its continuance or to ask for damages on its abandonment.

Mason v. Shrewsbury and Hereford Ry., Co. (1) followed.

Kana Mahomed v. Behatoo Bhowar (2) commented on.

Appeal by the Plaintiffs.

Suit for declaration of a right of easement to have discharged on their own land the surplus water of the land of the defendant.

The plaintiffs and the defendant were adjoining owners of land. The defendant used to discharge upon the land of the plaintiffs the surplus water of his tank through a channel on his own property. The defendant filled up that channel, with the result that the water did not any longer flow into the land of the plaintiffs. The present suit was instituted, substantially with a view to compel the defendant to restore the channel to its original condition, and to discharge as before the surplus water of his land through that channel upon the land of the plaintiffs. The Court of first instance made a decree in favour of the plaintiffs. Upon appeal, the Subordinate Judge dismissed the suit on the ground that the plaintiffs had not established a right enforceable under the law. Hence this appeal.

Babu Sachindra Prosad Ghose for the Appellants.

Babus Hemendra Nath Sen and *Kalidas Sarkar* for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the plaintiffs in a suit for declaration of a right of easement to have discharged on their own land the surplus water of the land of the defendant. The plaintiffs and the defendant are adjoining owners of land. It has been found that the defendant used to discharge, upon the land of the plaintiffs, the surplus water of his tank through

March, 13.

* Appeal from Appellate Decree No. 1158 of 1911, against the decree of Babu Ram Narain Sarker, Subordinate Judge of Beerbhumi, dated the 8th February, 1911, reversing that of Babu Ram Siromoni Ray Sen, Munsiff of Bolepur, dated the 20th December, 1909.

CIVIL.

1918.

Aftab Chowdhury

v.

Asokhudeen

Mookerjee, J.

a channel on his own property. Recently the defendant has filled up this channel, with the result that the water does not any longer flow into the land of the plaintiffs. The present suit has been instituted, substantially with a view to compel the defendant to restore the channel to its original condition, and to discharge as before the surplus water of his land through this channel upon the land of the plaintiffs. The Court of first instance made a decree in favour of the plaintiffs. Upon appeal, the Subordinate Judge has dismissed the suit on the ground that the plaintiffs have not established a right enforceable under the law. The question for decision, consequently, is, whether the plaintiffs have acquired the right of easement claimed.

It is an elementary doctrine that an easement exists for the benefit of the dominant tenement alone and that the servient owner acquires no right to insist on its continuance or to ask for damages on its abandonment. This principle was laid down by Cockburn C. J. in the case of *Mason v. Shrewsbury and Hereford Railway Company* (1), in the following terms: "It is of the essence of an easement that it exists for the benefit of the dominant tenement alone. Being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner. Like any other right, its exercise may be discontinued, if it becomes onerous or ceases to be beneficial to the party entitled." The same principle had been previously recognised in the cases of *Arkwright v. Gell* (2) and *Gaved v. Martyn* (3) and was subsequently formulated in similar terms by Lord Watson in the case of *Simpson v. Godmanchester Corporation* (4). We further find that the proposition was recently accepted as settled law in the cases of *M'Evoy v. The Great Northern Railway Company* (5) and *Hanna v. Pollock* (6). The rule was also applied by this Court in the case of *Khoorshed Hossein v. Teknarain Singh* (7). But much stress has been laid upon the decision in *Kena Mahomed v. Bokattoo Sircar* (8). In that case, it was stated that if the act of which the plaintiff complained was the prevention of the flow of the mere surface drainage not flowing in any channel, but percolating through or flowing over the surface and ultimately finding its way into the lower land of the plaintiff, that was a matter in which no

(1) (1871) L. R. 6 Q. B. 578 (587).

(2) (1839) 5 M. & W. 208.

(3) (1866) 19 O. B. N. S. 782 (758).

(4) (1897) A. O. 696.

(5) (1900) 2 I. R. 325.

(6) (1900) 2 I. R. 664.

(7) (1878) 2 O. L. R. 141.

(8) (1868) Marshall 506.

prescriptive right could be acquired and there was no foundation for the claim of the plaintiff. This proposition cannot be controverted on principle. But then follows this statement: "A prescriptive right to such waters could only be acquired when the water had reached and flowed in some defined channel, whether natural or artificial, into the defendant's land." If the learned Judges intended to lay down that the fundamental principle, that an easement exists for the benefit of the dominant tenement alone and that the servient owner acquires no right to insist on its continuance, ceases to be applicable when the water has flowed in a defined channel on the dominant tenement before it reaches the servient tenement, we are unable to accept this exposition of the law as well-founded on reason. There is, so far as we can discover, no authority to support it, and no intelligible reason has been assigned in this Court in support of the alleged distinction. We are of opinion, therefore, that the plaintiffs have acquired no right of easement under which they can compel the defendant to discharge upon their land, the surplus water of his land through a channel thereon.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

*Before Sir Asutosh Mukherjee, Knight, Judge, and
Mr. Justice Beachcroft.*

LAKHI NARAIN JAGDEB

v.

CHOWDHURY KIRTIBAS DAS.*

Court-fee, amount deposited for, refund of—Ad valorem Court-fee—Transfer of Property Act (IV of 1882), Secs. 89, 90—Decrees, nature of—Court-Fees Act (VII of 1870), Sec. 4—Decrees on appeal, effect of—Memorandum of appeal, court-fee in, insufficient—Court, if can re-open question of court-fee after decree.

It is not competent for a Court at the time of passing a decree under section 89 of the Transfer of Property Act to declare the personal liability of the mortgagor.

A decree under section 90 of the Transfer of Property Act can be passed only after it has been ascertained that the net proceeds of the sale of the mortgaged properties are insufficient to pay the amount due on the decree.

Lal Behary v. Habibur (1), Ram Ranjan v. Indra Narain (2), Demoder v. Vyanku (3) and Badri Das v. Inayat (4) referred to.

* Applications in re Appeals from Original Decrees Nos. 292 and 293 of 1908.

(1) (1898) I. L. R. 25 Cal. 168.

(8) (1906) I. L. R. 31 Bom. 244.

(2) (1906) I. L. R. 33 Cal. 890.

(4) (1900) I. L. R. 28 All. 404.

CIVIL.

1918.

Aftab Chowdhury

v.

Asokhadeen.

Mookerjee, J.

CIVIL.

1918.

March, 3.

CIVIL.

1913.

Lakhi Narain

Kirtibas Das.

An appeal from an order under section 90 of the Transfer of Property Act is an appeal from a decree, and in such appeal *ad valorem* Court-fees must be paid on the memorandum of appeal.

Section 4 of the Court-fees Act is imperative in its terms and makes it impossible for the Court to entertain a memorandum of appeal upon which a proper amount of Court-fee has not been paid.

If the legal advisers of either party with knowledge of the previous order have omitted to bring the question of the sufficiency of the Court-fee on the memorandum of appeal to the notice of the Court, and the Court has passed a decree, it is obligatory upon the Court, when the question is raised upon the application by the appellant to obtain a refund of the sum in deposit by order of Court, to consider whether the memorandum of appeal was or was not properly stamped.

Beohu Singh v. Bisharam Sahu (1) referred to.

Application by the Appellant.

Application for refund of a sum of money deposited in Court by the Appellants.

In an appeal from a decree under section 90 of the Transfer of Property Act, the appellant paid court-fees to the extent of Rs. 2 on an assumption that the appeal was directed against an order made in proceedings in execution of decree. The taxing officer asked the appellant to pay *ad valorem* Court-fees, and on refusal, the matter came before Caspersz and Sharfuddin JJ., who on the 2nd July, 1908, directed the appellant to deposit in Court the sum requisite for payment of Court-fees *ad valorem* on the memorandum of appeal. They further directed that the memorandum of appeal be registered and added that the point might be raised at the hearing of the appeal. The appeal was heard and decreed by Cox and Imam JJ. on the 14th March, 1912. The question reserved by Caspersz and Sharfuddin JJ. on the 2nd July, 1908, was not, however, raised either by the appellant or by the respondent. The appellant then applied for refund of the sum of money deposited in Court.

Babus Provas Chandra Mitter and *Susil Madhub Mullick* for the Petitioner.

Babus Ram Chandra Mosumdar, *Gunada Charan Sen* and *Sures Chandra Chakrabarti* for the Opposite Party.

The judgment of the Court was delivered by

March, 3.

Mookerjee J.—This is an application, made under very exceptional circumstances, for refund of a sum of money deposited in this Court by the appellants in an appeal from original decree. The petitioner was the defendant in a suit to enforce a mortgage

CIVIL
 1913.
 {
 Lakhī Narain
 v.
 Kirtibas Das.
 Mookerjee, J.

security. In the plaint, the mortgagee asked for the usual decree for sale, and also prayed that a personal decree might be made against the mortgagor, if the mortgage dues were not realised by sale of the mortgaged properties. The suit was heard *ex parte* and decreed on the 29th March, 1900. With reference to the question of the true effect of this decree, it has been suggested that the decree not only directed the sale of the mortgaged properties but also entitled the plaintiff to proceed personally against the mortgagor. We are not prepared to accept this contention as well-founded. The Subordinate Judge expressly directed the sale of the mortgaged properties but did not declare that the mortgagor would be personally liable; in fact, in view of the terms of section 90 of the Transfer of Property Act, it was not competent for him at that stage to make an order of this description. A decree under section 90 can be passed, only after it has been ascertained that the net proceeds of the sale of the mortgaged properties are insufficient to pay the amount due on the decree. This is plain from Form No. 7 in Appendix D of the Civil Procedure Code of 1908, and, it is clear that Rule 14 of the rules framed by this Court on the 6th August, 1884, under section 104 of the Transfer of Property Act did not give effect to the terms of section 90. *Lal Behary v. Habibur* (1), *Ram Ranjan v. Indra Narain* (2), *Damodar v. Vyanku* (3) and *Badri Das v. Inayat* (4). In any event, in the present case there is nothing to show that the Subordinate Judge acted in contravention of the clear terms of section 90. This view is confirmed by the conduct of the decree-holder. After the mortgaged properties had been sold, he applied on the 1st November, 1905, for a decree under section 90 and such a decree was made in his favour on the 11th May, 1907. The mortgagor then appealed to this Court, and, on the memorandum of appeal paid Court-fees to the extent of Rs. 2 on the assumption that the appeal was directed against an order made in proceedings in execution of a decree. Objection was promptly taken by the Deputy Registrar who pointed out that in a series of decisions of this Court, amongst which may be mentioned *Khatiza Bibi v. Ganga Charan Das* (5) and *Joges Chandra Ray v. Raj Kumar Roy* (6), *Rampratap*

(1) (1898) I. L. B. 26 Calo. 166. (3) (1906) I. L. B. 81 Bom. 244

(2) (1906) I. L. B. 38 Calo. 890. (4) (1900) I. L. B. 22 All. 404.

(5) Reg. File No. 8 of 1906 decided by Maclean O. J. and Mitra J. on 26th April, 1906.

(6) M.A. 94 of 1 00 decided by Ameer Ali and Brett JJ. on the 30th July, 1900.

CIVIL.

1918.

Lakhi Narain

v.

Kirtibas Das.

Mookerjee, J.

Singh v. Chuttu Singh (1) and *Dina Nath Mitter v. Bejoy Krishna Das* (2), it had been uniformly held that an order under section 90 was a decree, that an appeal from such an order was an appeal from a decree, and that, consequently, in such an appeal *ad valorem* Court-fees must be paid on the memorandum of appeal. The matter then came to be heard before Caspersz and Sharfuddin JJ., though section 5 of the Court-fees Act 1870 makes the decision of the Taxing Officer final. The learned Judges on the 2nd July, 1908, directed the appellant to deposit in Court the sum requisite for payment of court-fees *ad valorem* on the memorandum of appeal. They further directed that the memorandum of appeal be registered and added that the point must be raised at the hearing of the appeal. The appeal was heard by Cox and Imam JJ. on the 14th March, 1912. The question reserved by Caspersz and Sharfuddin JJ. on the 2nd July, 1908, was not, however, raised either by the appellant or by the respondent, and the matter was not brought to the notice of the learned Judges; the consequence was that the appeal was heard and decided on the merits, though it is unquestionable that the memorandum was insufficiently stamped. It has been stated before us that the point was overlooked by the learned Vakils on both sides. We unreservedly accept this statement. But we desire to add that if the legal advisers of either party, with knowledge of the previous order, had deliberately omitted to bring the matter to the notice of the Court, the conduct of the gentlemen concerned would have merited the gravest censure, and the only course open to the Court now would have been to discharge the judgment and decree passed under such circumstances, as section 4 of the Court-fees Act is imperative in its terms and makes it impossible for the Court to entertain a memorandum of appeal upon which the proper amount of court-fees has not been paid. It is consequently obligatory upon the Court, now that the question has been raised upon this application by the appellant to obtain a refund of the sum in deposit, to consider whether the memorandum of appeal was or was not properly stamped. Upon this matter, there is no room for serious controversy. The principle which underlies the decision of this Court in the case of *Bechu Singh v. Bicharam Sahu* (3), obviously applies to the case before us. In fact, in the

(1) S. A. 289 of 1899 decided by Ghose and Stevens JJ. on the 12th January, 1899.

(2) A. O. D. 194 of 1900 decided by Banerjee and Stevens JJ. on the 18th June, 1900.

(3) (1909) 10 C. L. J. 81.

present case the position is very much stronger. Even if it be conceded that there is scope for divergence of judicial opinion upon the question, whether or not an order absolute is a final decree in a mortgage suit, there can be no controversy that an order under section 90 of the Transfer of Property Act is a decree. Section 90 describes the order as a decree; the order has all the characteristics of a decree as defined in the Code of Civil Procedure; it determines the personal liability of the mortgagor to pay to the mortgagee the amount of the judgment-debt not realised by the sale of the mortgaged properties; the order presupposes an adjudication by the Court that such balance is legally recoverable from the defendants otherwise than out of the property sold. It is consequently incontrovertible that the order is a decree; an appeal preferred against the order must be treated as an appeal from original decree and court-fees levied *ad valorem* upon the memorandum of appeal. But we do not decide a question which may possibly arise hereafter, namely, if an appeal is preferred against a decree *nisi* or a decree absolute in a mortgage suit, whether, upon an appeal preferred against the decree under section 90, court-fees can be levied a second time; that point is not before us and we reserve our opinion upon it. In the present case, we are clearly of opinion that the memorandum of appeal was not properly stamped. We direct accordingly that the amount in deposit in this Court be now applied in the purchase of court-fees to be annexed to the memorandum of appeal. The consequence will be that the appellants will be entitled to have these costs included in the decree they have obtained against the respondent. The decree must be amended in this respect.

The same question arises in another appeal (Reg. 293 of 1908) in which a separate application has been presented. That appeal was dismissed by this Court on the merits. Consequently, the decree in that case does not stand in need of amendment. But the amount in deposit in that case also must be applied in the purchase of court-fees to be annexed to the memorandum of appeal.

A. T. M. *Applications refused : Decree ordered to be amended.*

CIVIL.

1918.

Lakhi Narain

c.

Kirtibas Das.

Mookerjee, J.

CIVIL RULE.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

RADHA GOBIND MISRA

v.

RAGHUNATH MISRA.*

CIVIL.

1918.

May, 5.

*Claim to be restored to possession—Joint family, member of, purchaser from—
Execution purchaser—Civil Procedure Code (Act V of 1908), O. XXI
R. 101.*

The terms of Rule 101, Order XXI of the Code of Civil Procedure are comprehensive enough to cover a case of a claim by a representative of a member of a joint family other than the judgment-debtor. The effect of an order in favour of the claimant is to restore him to joint possession with the execution-purchaser.

Govorji v. Dewsey (1) commented on. *Gorinda Nair v. Kanna* (2) approved.

Application for revision by the auction-purchaser.

Claim by a purchaser from a member of a joint family other than a judgment-debtor, under Order XXI, Rule 101 of the Code of Civil Procedure. The question in the case was whether such a claim was maintainable.

Babu Susil Madhab Mullick for the Petitioner.

Mr. Misra (Counsel), *Babus Probodh Kumar Das* and *Pramatha Lal Dutt* for the Opposite Party.

The judgment of the Court was delivered by .

May, 5

Mookerjee J.—We are invited in this Rule to set aside an order under Rule 101 of Order 21 of the Code of Civil Procedure of 1908. That Rule provides for an adjudication of claims preferred by persons who have been dispossessed by a decree-holder or auction-purchaser, and lays down that where the execution Court is satisfied that a claimant of this description was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put in possession of the property. The petitioner before us obtained a mortgage decree against a member of a joint Mitakshara family. He became the purchaser in execution of that decree. When possession of the property was delivered to him, a person who claimed to be a purchaser from a member of the family other than the judgment-debtor,

* Civil Rule No. 398 of 1918 against the decision of Babu L. Patnaik, Munsiff of Jaipur, dated the 6th January, 1918.

(1) (1893) I. T. B. 17 Bom. 718.

(2) (1880) I. L. R. 8 Mad. 81.

preferred a claim under Sub-rule (1) of Rule 101. The contention of the claimant, who is the opposite party in this Rule, was that he was in possession of the property on his own account and, that consequently he was not liable to be dispossessed by the auction-purchaser. The Court below has found as a fact that the claimant was in joint possession of the property along with the judgment-debtor. The question consequently arises whether his claim may be allowed under Rule 101. On behalf of the execution-purchaser, it has been contended that Rules 100 and 101 do not apply to a case of this description. It has been urged that when two persons are jointly in possession of a property, and in execution of a decree obtained against one of such persons, the decree-holder proceeds to take possession of the property, or, if a purchaser at a sale held in execution of a decree obtained against one of such persons proceeds to take delivery of the property, the other person who is dispossessed cannot contend that he is in possession on his own account, as his possession admittedly is joint possession with the judgment-debtor. In support of this view, reliance has been placed upon the case of *Cooverji Hirji v. Dewsey Bhoja* (1). In this case Mr. Justice Strachey observed that a member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account, as his possession is possession of the family, unless there is evidence to show that he set up a right to a particular piece of land adversely to the family, which, it has always been held, must be very strictly proved. In so far as the learned Judge lays down that a member of a joint Mitakshara family cannot say that he is in possession of a specified portion of the joint property, on his own account, the proposition is unquestionably correct; but in so far as the learned Judge lays down that a person who is in joint possession is not in possession on his own account, the proposition appears to us to be open to criticism. The point now taken was raised before this Court in the case of *Sankar Nath Pandit v. Madan Mohan Das* (2) where it was observed, on the assumption that Rules 100 and 101 were applicable to a case of this character, that an order for restoration of possession ought not to specify the share held by the claimant. It was pointed out in this case, that, upon the question raised, there was a divergence of judicial opinion, and, that in the case of *Govinda Nair v. Kesava* (3) a view had been taken

CIVIL

1913.

Radha Gobind

v.

Raghunath.

Mookerjee, J.

(1) (1898) I. L. B. 17 Bom. 718.

(2) (1909) 11 O. L. J. 61.

(3) (1880) I. L. B. 8 Mad. 81.

CIVIL

1913.

Radha Gobind

r.

Baghunath.

Mookerjee, J.

contrary to that adopted in the case of *Cooverji Hirji v. Dewsey Bhoja* (1). The point, however, was left open, as the case was decided on other grounds. We are of opinion, that the view taken in *Govinda Nair v. Kesava* (2) is well-founded on principle. In this case Mr. Justice Muttusami Ayyar held that a claimant, who has an interest in the land of which possession has been delivered, either as a member of the family or otherwise, and who is affected by the delivery of possession, as he himself is in possession, is really a person who is in possession in respect of his own interest though joint with the judgment-debtor, and, he can, consequently, claim to be in possession of the property on his own account within the meaning of section 331 of the Code of 1882. His joint interest with the judgment-debtor cannot prevent him from claiming in good faith in respect of his own interest. The effect of his obstruction and claim may be to set up a case in the judgment-debtor against the execution-purchaser, if the joint right of the judgment-debtor is in every respect similar to his. But this can make no difference, as the claimant should not lose his joint right, because his co-tenant cannot set up his right as against the execution purchaser. In our opinion, the terms of Rule 101 are comprehensive enough to cover a case of this description. There is no anomaly involved in the view we take. The only effect of an order in favour of the claimant is to restore him to joint possession in the same manner as before; in other words, the execution-purchaser is placed in possession only to this extent, that the possession of his judgment-debtor is terminated and he has to remain in joint possession along with the claimant, as his judgment-debtor had previously done. We hold accordingly that the Court below had jurisdiction to entertain the claim.

The result is that this Rule is made absolute in part and the order of the Court below varied to this extent only, namely, that the claim is allowed and the claimant is restored to joint-possession as before, so that he will be in joint possession with the execution-purchaser. There will be no order for costs in this Rule.

A. T. M.

Rule made absolute in part.

(1) (1898) I. L. B. 17 Bom. 718.

(2) (1880) I. L. B. 3 Mad. 81.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

ANANDAMOYI DASÍ

v.

RUDRA MAHANTI.*

CIVIL.

1912.

April, 16.

*Jurisdiction—Rule, hearing of—Rule obtained on behalf of dead person—Civil
Procedure Code (Act V of 1908), O. 22 R. 3.*

A Rule cannot be issued at the instance of a person who is dead at the time the application is made. A Rule so issued is a nullity.

The principle recognised in Rule 8 of Order XXII of the Code of Civil Procedure is applicable not only to suits, but also to proceedings in revision.

Application for revision by the Decree-holder.

Application by the Opposite Party under section 170, sub-section (3) of the Bengal Tenancy Act, alleging interest in the property advertised for sale. The Court below allowed him to deposit the money. The decree-holder on hearing of the order filed an objection as to the *locus standi* of the petitioner. The Court below rejected the decree-holder's application. Against those two orders, the decree-holder moved the High Court. The petition was however filed by the vakil after his (decree-holder's) death. The question was whether the High Court had jurisdiction to hear the Rule.

Babu Jyotis Chandra Hazra for the Petitioner.

Babu Khetra Mohan Sen for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee J.—This Rule, granted on the 16th December 1912, directs the opposite party to show cause why the orders of the Court below, made on the 18th July and the 18th September 1912, should not be set aside. The opposite party has entered appearance and has contended that the Rule ought to be discharged, because at the time the Rule was granted, the petitioner on whose behalf the application was made was dead. This is not disputed by the learned vakil who appears in support of the Rule. He explains that the papers were made over to him in time to make the application on the 25th November 1912, and that he did apply to this Court but was obliged to withdraw the application in order to enable him to ascertain fully the facts of the case. He subsequently renewed the application on the 16th December 1912, but in ignorance of the fact that the petitioner had died in the interval on the 8th December 1912.

April, 16.

* Civil rule No. 7501 of 1912, against the orders of Syed Wasik Ali, Deputy Collector of Balasore, dated the 18th July and 18th September, 1912.

CIVIL.

1918.

Anandamoyi Debi

v.

Rudra Mahanti.

Mookerjee, J.

But although this explains why the application was made by him on behalf of a dead person, it cannot possibly validate the Rule. As soon as the intending petitioner died, the authority of the learned vakil to make the application terminated. But, it has been argued that the legal representatives of the deceased petitioner may be allowed to proceed with this Rule; we cannot possibly accede to this contention. A Rule cannot be issued at the instance of a person who is dead at the time the application is made. A Rule so issued is plainly a nullity. The principle recognised in Rule 3 of Order 22 of the Code of 1908 is applicable not only to suits, but also to proceedings in revision [cf. *Deosaran v. Syedunnessa* (1)].

The result is that this Rule must be discharged, but there will be no order for costs.

A. T. M.

Rule discharged.

(1) (1912) 16 C. L. J. 571.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

RAM NATH MAITY

v.

RUDRA MAHANTI.*

CIVIL.

1918.

April, 16.

*Notice—Bengal Tenancy Act (VIII of 1885), Sec. 170 Sub-Sec. (3)—Third
person applying to deposit money.*

No order can be made so as to affect the interests of a party to the proceedings, till he has been afforded a reasonable opportunity to be heard in support of his case.

Notice should be given to the decree-holder, if an application to deposit money under sub-section (3) of section 170 of the Bengal Tenancy Act be made by the judgment-debtor, and to the decree-holder as well as to the judgment-debtor, if by a stranger to the proceedings. If either of them contests the right of the applicant to make the deposit, the question should be decided in their presence.

Ranajit v. Jogendra (1) referred to.

Application for revision by the legal representative of the Decree-holder.

Application by the Opposite Party under sub-section (3) of Section 170 of the Bengal Tenancy Act, alleging interest in the property advertised for sale. The Court below by an *ex parte* order allowed him to deposit the money. The decree-holder then filed a petition of objection stating that the applicant had

* Civil Rule (issued in place of Rule No. 7501 of 1912), against the orders of Syed Wasik Ali, Deputy Collector of Balasore, dated the 18th July and 18th September, 1912.

no *locus standi*. The Court below without entering into the merits, rejected the objection. The decree-holder then moved the High Court.

Babu Jyotis Chandra Harra for the Petitioner.

Babu Khetra Mohan Sen for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee J.—We are invited in this Rule to set aside an order made by the Court below under sub-section 3 of section 170 of the Bengal Tenancy Act. The decree-holder took out execution of a decree for rent, and, on the 2nd July 1912, the Court directed the issue of attachment and sale proclamation with a view to hold the sale on the 30th August 1912. On the 8th July 1912, the present opposite party, who was not a party to the proceedings, applied for leave to deposit the decretal amount under sub-section 3 of section 170 of the Bengal Tenancy Act. The Court thereupon directed the applicant to prove his interest; this he did on the 13th July, 1912. It was held that as his interest had been *prima facie* established, the deposit might be accepted and the proceedings discontinued. After this order had been made, the decree-holder appeared and prayed that he might be heard, inasmuch as the order had been made without notice to him. The Court below declined to hear him. The decree-holder now invites us to set aside the order made behind his back. On behalf of the applicant in the Court below, it has been contended that sub-section 3 of section 170 does not expressly provide for the issue of a notice to the decree-holder, and merely lays down that the judgment-debtor or any person having in the tenure or holding any interest voidable on the sale, may pay money into Court under the section. No doubt, the sub-section does not explicitly direct the issue of a notice to the decree-holder; but it is an elementary principle of law that no order can be made so as to affect the interest of a party to the proceedings, till he has been afforded a reasonable opportunity to be heard in support of his case. The decree-holder here has the right to proceed with execution of his decree, unless the decree is satisfied by a person of the description mentioned in section 170 (3); he asserts that the opposite party is not such a person, as the latter has no interest in the holding advertised for sale and is consequently incompetent to take advantage of the provisions of that section. This raises a question of fact which must obviously be determined in the presence of all the parties interested in the decision of the question. It has been ruled that in a case under section 174 of the Bengal

CIVIL

1918.

Ram Nith Maitty

Buddha Mahanti.

April, 16.

CIVIL.

1911.

Bam Nath Malty

v.
Budra Mahanti.

Mookerjee, J.

Tenancy Act, notice must be served upon the persons interested in maintaining the sale : *Janardhan v. Kali Kristo* (1), *Bungshidhar v. Kedar Nath* (2); the same principle has been applied to cases under section 310 A of the Civil Procedure Code of 1882 : *Kripali Singh v. Pairoo Raut* (3), *Bibi Sharifan v. Mahomed Habibuddin* (4). We are of opinion that this principle clearly applies to cases under sub-section 3 of section 170. If the application is made by the judgment-debtor, notice must be given to the decree-holder. If the application is made by a stranger to the proceedings, notice must be given to the decree-holder as well as to the judgment-debtor, and if either of them contests the right of the applicant to make the deposit, the question must be decided in their presence : *Ranajit Kumar v. Jogendra Nath* (5). As this course has not been followed in the case before us, the Rule is made absolute, the order of the Court below discharged, and the case remitted to the Court below, so that the application of the 8th July 1912 may be re-heard in the presence of the decree-holder and the judgment-debtor. The costs of this Rule will abide the result. We assess the hearing fee at one gold mohur.

A. T. M.

Rule made absolute.

(1) (1895) I. L. R. 23 Calo. 898 (396).

(2) (1896) 1 O. W. N. 114.

(4) (1911) 18 O. L. J. 535.

(8) (1909) 11 O. L. J. 88.

(5) (1912) 18 O. L. J. 546.

Before Mr. Justice Stephen and Mr. Justice D. Chatterjee.

HARAI SAHA AND OTHERS

v.

FAIZLAR RAHMAN AND OTHERS.*

CIVIL.

1912.

January, 24.
March, 5.

Civil Procedure Code (Act V of 1908), Section 73, scope of—Sale in execution of a decree—Decretal amount, deposit of, by judgment-debtor, under Order XXI, Rule 89—Rateable distribution, application for, by other creditors.

The Court has no power under section 73 of the Code of Civil Procedure to distribute rateably among several creditors of a judgment-debtor, the money deposited by the latter under Order XXI, Rule 89 of the Code for setting aside a sale held in execution of a decree of one of the creditors.

Bahari Lal Paul v. Gopal Lal Seal (1) followed.

Application by the decree-holders, Harai Saha and others.

The petitioners Harai Saha and others obtained a decree for Rs. 982-7 against the judgment-debtors, opposite party Nos. 1—5, in the Court of the 5th Munsiff at Comilla. They prayed

* Civil Rule No. 6727 of 1912, against the order of Babu Jogendra Chandra De Bhaumick, Munsiff, 5th Court, Comilla, dated the 23rd December, 1912, passed in Execution Case No. 172 of 1912 of the said Court.

(1) (1897) 1 O. W. N. 696.

for the execution of that decree in February 1912. The properties of the judgment-debtors were sold for Rs. 882, on 15th August, 1912, but the decretal amount together with compensation having been deposited within the statutory period under Order XXI, Rule 89 of the Code of Civil Procedure, the sale was set aside on 17th September, 1912.

On the 12th August, 1912, opposite party Nos. 6 and 7, who had also obtained money decrees against the judgment-debtors, applied for rateable distribution of the sale proceeds, and on the 30th August, 1912, other decree-holders, Opposite party Nos. 8 and 9, did also make a similar application. The petitioners put in an objection that the money deposited under Order XXI, Rule 89 of the Civil Procedure Code could not be rateably distributed among the several creditors of the judgment-debtors.

The learned Munsiff overruled the objection of the petitioners decree-holders, and granted the applications for rateable distribution, and the petitioners were allowed only Rs. 576-10 as out of the sum deposited.

Against that order the petitioners moved the High Court, and obtained the Rule.

Babu Harendra Narain Mitter (with him *Babu Upendra Kumar Roy*) for the Petitioner, submitted that the deposit having been made under Order XXI, Rule 89 (corresponding with section 310A of the Civil Procedure Code of 1882) the whole of the deposit should go to the particular decree-holders through whose diligence the properties were brought to sale and assets were realised. He relied on the cases of *Roshun Lall v. Ram Lal Mullick* (1), *Hari Sundari Dasya v. Shashi Bala Dasya* (2), *Bihari Lal Paul v. Gopal Lal Seal* (3), and *Vibudhapriya Tirthaswami v. Yusuf Sahib* (4). Judgment-creditors attaching after realisation are not entitled to any share in the assets: see *Fink v. Maharaj Bahadur Singh* (5). He further submitted that as there had been no change in the wording of Order XXI, Rule 89, the intention of the Legislature could not be to allow other decree-holders to come in.

Babu Yogesh Chandra Roy (with him *Babu Jotindra Mohan Ghose*) for the Opposite party. Section 73 of the new Code is of a wider scope than section 295 of the old Code; and "assets held by Court" must include the deposit made under Order XXI, Rule 89 of the Code. Moreover, section 73 is a

CIVIL.

1912.

Harai Saha

v.
Faizlar Rahman.

January, 24

(1) (1908) I. L. R. 30 Calo. 262

(2) (1906) I. O. W. N. 193.

(4) (1905) I. L. R. 28 Mad. 830 (833).

(3) (1907) I. O. W. N. 693.

(5) (1892) I. L. R. 20 Calo. 772.

CIVIL

1918.

Hari Sahi
v.
Fakir Bahman

substantive section while Order XXI, Rule 89 is but a rule of procedure, and the substantive section must govern the latter. The cases relied on by the other side were decided under the old Code, and can be of no assistance for the decision of the present case. The learned Munsiff was right in granting the prayer for rateable distribution, otherwise it would mean extreme hardship upon the judgment-creditors who could not get anything although they were equally entitled to their share in the assets realised.

Babu Harendra Narain Mitter, in reply.

C. A. V.

The judgment of the Court was as follows :

March, 5.

The petitioners before us obtained a money decree against certain persons, and executed it by a sale of immoveable property belonging to them. Two decree-holders in other suits, opposite parties Nos. 6 and 7, then applied under section 73 of the Code for rateable distribution of the money realised by the sale in the petitioner's suit ; the judgment-debtor proceeded to deposit in Court under Order XXI, Rule 89 money representing the decretal amount, and got the sale set aside ; after which opposite parties Nos. 8 and 9 applied for rateable distribution, which was made among the petitioners and all the other decree-holders. A Rule has been granted calling on the decree-holders other than the petitioners to show cause why the order made under section 73 should not be set aside on the ground that the Court had no power to order rateable distribution.

Under the old Code it was held by this Court in *Roshun Lall v. Ram Lall Mullick* (1) that when money was paid into Court under section 310A there could be no rateable distribution under section 295 for the terms of the former section were too precise to admit of the application of the latter. This followed the decisions in *Hari Sundari Dasya v. Shashi Bala Dasya* (2) and *Bihari Lal Paul v. Gopal Lal Seal* (3) where, as in this case, application for rateable distribution was made before the payment into Court under section 310A, now represented by Order XXI, Rule 89. This case is therefore covered by authority unless the alterations effected in the enactments in question have changed the law. Section 310A of the old Code is practically reproduced in Order XXI, Rule 89 ; but section 295 is replaced by section 73. The result of this is that whereas the

(1) (1903) I. L. B. 30 Calo. 262.

(2) (1896) 1 O. W. N. 106.

(3) (1897) 1 O. W. N. 696.

subject-matter of rateable distribution used to be "assets realised by sale or otherwise in execution of a decree" it is now "assets held by the Court." It is obvious that the scope of the new section is thus far wider than that of the old one; but this does not alter the effect of the enactment in section 310A which is reproduced in Order XXI, Rule 89.

The result is that this Rule must be made absolute and the order set aside. The petitioner is entitled to his costs, one gold mohur.

A. N. R. C.

Rule made absolute.

Before Sir Richard Harington, Bart. Judge and

Sir Herbert Carnduff, Knight, Judge

EAST INDIAN RAILWAY COMPANY

v.

BABU MADHO LAL.*

Indian Railways Act (IX of 1890), Secs. 77, 140,—Railway company—Damage of goods delivered—Notice of claim to compensation—Divisional Traffic Manager, notice on, whether sufficient.

A notice of claim in respect of goods delivered in a damaged condition by a Railway Company must be served as provided by sections 77 and 140 of the Railways Act.

Where, therefore, a notice of claim was served on the Divisional Traffic Manager of a Railway Company, and not on the Agent in India of the Company, the service was not a sufficient compliance with the provisions of the Act, and the suit subsequently brought against the Railway Company for compensation was liable to be dismissed inasmuch as the plaintiff in the action did not comply with the condition precedent to his suit.

Nadiah Ohsad Shaha v. Wood (1) followed.

V. Woods, Agent to the Assam Bengal Railway Company v. Mahor Ali Bopari (2) explained.

Rule obtained by the defendant Railway Company.

Plaintiff, Babu Madho Lal, brought a suit in the Court of the Small Cause Court Judge at Barh, District Patna, against the defendant, The East Indian Railway Company, for compensation for damages caused to goods during transit by the defendant company. It appeared that before the institution of the suit the plaintiff served the notice of claim upon the Divisional Traffic Manager and not upon the Agent of the Company.

Defendant contended *inter alia* that there was no sufficient service of notice within the meaning of the Railways Act, and as such the suit was liable to be dismissed, and that the company

* Civil Rule, No. 6683 of 1912, against the decision of the Small Cause Court Judge of Barh, District Patna, dated the 26th August, 1912.

(1) (1907) I. L. R. 35 Cal. 194.

(2) (1903) 18 O. W. N. 24.

CIVIL.

1918.

Harai Saha

Faislar Rahman.

CIVIL.

1918.

March, 10.

CIVIL.

1918.

East Indian
Railway Company
v.
Babu Madho Lal.

was absolved from all liability according to the terms of the contract.

The learned Small Cause Court Judge overruled the objections of the defendant, and decreed the plaintiff's suit.

Against that decision the defendant company moved the High Court, and obtained this Rule.

Babu Hari Bhushan Mukherjee, for the petitioner, submitted that the Munsiff was wrong in decreeing the suit against the Railway Company inasmuch as the consignor signed a Risk-note in Form A, which absolved the company from all liability. Besides, the notice of claim not having been served on the agent of the company, as required by sections 77 and 140 of the Railways Act, the suit was incompetent and could not be maintained: See *Great Indian Peninsula Railway v. Devasi Verses* (1) and *Nadiar Chand Shaha v. Wood* (2).

Babu Ganesh Dutt Singh, for the Opposite party, contended that the Risk-note did not absolve the company from the liability. The notice of claim having been served before the Divisional Traffic Manager of the company, there was a sufficient compliance with the provisions of the Act. The company took all the steps that they could and ought to take, and fought out the case. The suit was quite competent. He relied on the case of *V. Woods, Agent to the Assam Bengal Railway Company v. Meher Ali Bepari* (3) in support of his contention.

The judgments of the Court were as follows:

March, 10.

Harington J.—This is a Rule to set aside a judgment given against the East Indian Railway Company on the ground, amongst others, that no claim was served on the company under the provisions of section 77 of the Indian Railways Act. That section provides that a claim such as the present claim which is made in respect of goods which are delivered in a damaged condition shall not be enforced unless it is made in writing to the railway administration within six months from the date of the delivery of the goods. Now, section 140 provides how that claim is to be served and enacts that any document required or authorized by this Act to be served on a railway administration may be served, in the case of a railway administered by the Government, on the manager and, in the case of a railway administered by a railway company, on the agent in India of the Railway Company; and, then it goes on, in the

(1) (1907) 9 Bom. L. B. 912. (2) (1907) J. L. B. 85 Calo. 194.

(3) (1908) 18 O. W. N. 24.

CIVIL.

1918.

East Indian
Railway Companyv.
Babu Madho Lal.

Harington J.

sub-clauses, to describe how that claim is to be served which it is unnecessary to deal with in this case. The complaint made by the Railway Company in the present case is that the judgment of the lower Court cannot stand because the sections of the Railways Act to which I have referred have not been complied with. The claim in question was served within six months but it was served on the Divisional Traffic Manager and the learned vakil for the opposite party argues that that is a sufficient compliance with the provisions of the Act. It is quite clear to me that it is not so. There is a direct authority contrary to the view taken by the learned vakil which is to be found in the case of *Nadiar Chand Shaha V. Wood* (1), and that case laid down that the notice must be served as provided by section 140 and that the service on the Traffic Manager in the case of a railway administered by the Railway Company instead of on the agent is not a service within the Act. It is perfectly clear to my mind that that decision is a perfectly correct one. On the other hand, reliance has been placed by the learned vakil on the case of *V. Woods, Agent to the Assam Bengal Railway Company v. Meher Ali Bepari* (2). If that case purported to lay down as a matter of law that a service on the Traffic Manager was a sufficient compliance with the Act and was a good service as on the agent, I shall not be prepared to agree with it. But the decision appears to have gone on the finding come to on the particular facts of that case that the agent had authorized the Traffic Manager to receive the notice; at least, that is the fact, as I follow the judgment. The result is that, in my opinion, this Rule ought to be made absolute on the very short ground that the plaintiff in the action did not comply with the condition precedent to his suit which is found in section 77 of the Railways Act by not serving the claim as provided by section 140 of that Act. On this ground, the Rule is made absolute with costs, the hearing fee being assessed at one gold mohur.

Carnduff J.—I agree.

A. N. R. C.

Rule made absolute.

(1) (1907) I. L. B. 85 Cal. 194.

(2) (1908) 18 O. W. N. 24.

CRIMINAL REVISION.

Before Mr. Justice Cox and Mr. Justice Mulick.

GOBINDA CHANDRA RAY

v.

GOPAL CHANDRA PANDIT.*

CRIMINAL.

1918.

March, 6.

Transfer of case—Criminal Procedure Code (Act V of 1898) Sec. 526—Security for keeping peace—Magistrate acting as private arbitrator—Magistrate, if can subsequently try.

Where a Magistrate has dealt with a dispute between two parties in an informal manner as a private arbitrator :

Held, he should not afterwards deal with the same dispute between the same parties as a Magistrate, as it would be inconvenient and embarrassing for him to do so under the strict restrictions of the Procedure Code and the Evidence Act and as his previous informal knowledge must necessarily hamper him at every turn.

Rule obtained by the Accused.

Application for transfer under section 526 of the Code of Criminal Procedure in proceedings under section 107 of the said Code.

The facts of the case were as follows :

A family dispute between the petitioner and his mother regarding family properties resulted in an application made by the latter praying that proceedings under section 107 of the Code of Criminal Procedure be drawn up against the petitioner and his officer. The Subdivisional Magistrate seeing what the application really meant offered to mediate and settle the disputes. By consent of both the parties he was appointed a sort of a private arbitrator. The proceedings under section 107 were necessarily dropped. The terms suggested by the sub-divisional Magistrate for amicable settlement were not agreed to by the petitioner who unsuccessfully applied for a modification and the arbitration fell through. The proceedings under section 107 were then revived on a fresh application by the opposite party and the petitioner was called upon to shew cause. The petitioner first applied to the Sub-divisional Magistrate for a reference to the District Magistrate for a transfer and then to the District Magistrate himself who rejected his petition.

Babus Sharat Chandra Roy Chowdhury and Govinda Chandra Chakraverty for the Petitioner.

Babu Srish Chandra Chowdhury for the Crown.

* Criminal Revision No. 190 of 1918.

The judgment of the Court was as follows :

This was a Rule calling upon the District Magistrate to show cause why a certain case should not be transferred from the file of the Sub-Divisional Magistrate on the ground that he had acted as a private arbitrator in the same dispute.

We think that on the whole this Rule should be made absolute. It must necessarily be in our opinion, very inconvenient and embarrassing to the Magistrate after he has dealt with this dispute in an informal manner as a private arbitrator subsequently to deal with the same dispute between the same parties as a Magistrate under the strict restrictions of the Procedure Code and the Evidence Act. We have no doubt whatever that he would do his utmost to be perfectly fair and to observe those restrictions. But it seems to us that his previous informal knowledge must necessarily hamper him at every turn.

Accordingly the Rule will be made absolute. The case will be transferred to such other competent Magistrate as the District Magistrate may direct.

D. K. R.

Rule made absolute.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

GOLAB CHAND

v.

JANKI KOER

AND

JANKI KOER

v.

GOLAB CHAND.*

Saltpetre, exclusive right to dig—Munak Sayar Mahal, Permanent Settlement of—Reasonable right of user—Permanent Settlement—Assets—Grant—Review—Appeal, restoration and re-hearing of.

The first matter to be determined in considering the effect of a Permanent

* Appeal from Appellate Decree No. 1853 of 1907, against the decree of Babu Umes Ohandra Sen, Sub-Judge, Muzaffarpore, dated the 27th March, 1907, affirming that of Babu Asutosh Ghose, Munsiff, Motihari, dated 27th January, 1906.

Appeal No. 89 of 1910, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Carnduff, dated the 28th March, 1910, in Appeal from Appellate Decree No. 1853 of 1907.

Appeal from Appellate Decree No. 628 of 1908, against the Decree of S. C. Mallick Esq., District Judge, Muzaffarpore, dated the 7th December, 1907, modifying that of Babu Sham Narain, Munsiff, Motihari, dated the 4th June, 1907.

CRIMINAL.

1918.

Gobinda Ohandra

v.

Gopal Ohandra.

March, 6.

CIVIL.

1918.

June, 24, 25.

July, 3.

CIVIL.

1918.

Golab Ohand

v.
Janki Koer.

Settlement is, what were the assets of the estate then settled. The doctrine of English real property law, with its maxim *ejus est solum ejus est usque ad coelum et ad inferos* is inapplicable to the settlement of estates in Behar.

A grant carries with it the means reasonably necessary for its enjoyment.

A separate right exists in respect of saltpetre.

Where both the zamindari and the *Nimak Sayer Mahal* within the zamindari were separately settled under the Permanent Settlement, the proprietor of the *Nimak Sayer Mahal* is entitled to enter on the land comprised in the estate of the zamindar and exercise therein in a reasonable manner the rights vested under the grant (a. g. the exclusive right to dig saltpetre). The mode of reasonable user in such cases, explained.

The Government of Bengal v Nawab Jafur Hossain Khan (1), distinguished.

In the case of the King's Prerogative in Saltpetre (2), referred to.

Golab Chand v. Janki Koer (8), not aside on review.

An appeal was heard and disposed of by two Judges of the High Court. After the retirement of one of the Judges, the other Judge entertained an application for review of judgment and granted it; he subsequently proceeded to hear the appeal and delivered a judgment in agreement with and confirmation of the judgment by which the appeal had been originally disposed of. The plaintiff appealed under clause 15 of the Letters Patent:

Held, that as soon as the review had been admitted, the appeal was restored, and could thereafter be heard only by the Division Bench in charge of the Group to which the appeal belonged.

Appeal No. 1353 of 1907 was by the Defendants, and Appeal No. 628 of 1908 was by the Plaintiff.

The suits were substantially for affirmation and protection of an exclusive right to collect nitrous earth in a *Nimak Sayer Mahal* of Sarkar Champaran and for injunction restraining the defendant from interfering with the reasonable exercise of the right. The defendant contended that as it would be inconsistent with his zamindari right, it could not be upheld and the utmost the plaintiff could claim was the right to collect revenue, if saltpetre happened to be manufactured. The suits were heard separately by different Munsiffs, and were decreed. The defendant preferred separate appeals, which were heard by different District Judges. The appeal in the first suit was dismissed, while the appeal in the second suit was decreed. The defendant appealed to the High Court in the first suit (No. 1353 of 1907), while the plaintiff appealed in the second suit (No. 628 of 1908.) The former appeal became ready for disposal first and was heard; the latter appeal was adjourned from time to time, to abide the result of the former appeal, as precisely the same point was involved in the two appeals. Appeal No. 1353 of 1907 was heard in the first instance by Mitra and Carnduff JJ. on the 11th and 14th December, 1908. The judgment of their Lordships, delivered

(1) (1851) 5 M. I. A. 457. (2) (1807) 12 Co. 12. (3) (1908) I. L. B. 36 Calc. 237.

on the 17th December, 1908, by which the suit was remanded, is reported in *Golab Chand v. Janki Koer* (1). After the retirement of Mr. Justice Mitra from the Bench, the plaintiff respondent applied for review of judgment. This application, according to the Rules of the Court, was heard by Mr. Justice Carnduff alone, and on the 17th May, 1909, his Lordship directed a Rule to issue, calling upon the defendant opposite party (the successful appellant) in the appeal to show cause why a review of judgment should not be granted. The Rule was heard on the 2nd August, 1909, by his Lordship, and, on the 11th August, 1909, the following judgment, admitting the review, was delivered by

Carnduff J.—This is an application for a review of the judgment of Mr. Justice Mitra and myself which has been reproduced in the current volume of the Calcutta Series of the Indian Law Reports at pages 269 and 270. The plaintiff Maharani sought for (a) a declaration of her "right to a monopoly in the manufacture of saltpetre and the collection of saltpetre earth" in a certain village in the District of Champaran, (b) an injunction restraining the defendants from infringing that right, and (c) an order that either the *diki* for the manufacture of saltpetre in the village be demolished or possession thereof be delivered to her. The suit was decreed by both the Courts below, and my learned brother and myself, by holding that the Maharani was undoubtedly entitled to a declaration of her right as the Permanent Settlement holder of the Nimak Sayer Mehal of Sarkar Champaran which includes the village in question and thus concurring on the main point at issue, practically approved their decision. But we also found—and this was admitted on behalf of the Maharani—that the relief asked for had in certain respects been faultily described and that the decree accordingly required some modification, and, before disposing of the appeal, we directed a remand for the purpose of ascertaining the precise way in which the exclusive right claimed by the plaintiff had been exercised in the past.

It is this order for remand which the petitioner seeks to have reviewed, and, Mr. Justice Mitra having left the Court, I am moved to allow this to be done on two grounds, namely, *first*, that the further enquiry directed is outside the scope of the suit and wholly unnecessary, and, *secondly*, that the order took the plaintiff respondent, by surprise, so that she had no opportunity of contesting its expediency.

CIVIL.

1918.

Golab Chand

Janki Koer.

1909.

August, 11.

CIVIL

1918.

Golab Chand

v.
Janki Koer.

Taking the second ground first, I am bound to admit that there was, so far as I remember, no argument or discussion of any kind at the bar as to the necessity for any remand, and that our order directing one was of the nature of an afterthought. And, as to the remaining contention, I confess that I am impressed by it. The broad issue upon which the case went to trial, was well understood, and it was simply as to whether or not the plaintiff had, by virtue of the settlement with her of the Nimak-Sayer Mehal, a right to take away herself or through others any saltpetre-producing earth in the village referred to, although she had no proprietary right therein; and, while it cannot be denied that she is not entitled to a monopoly for the manufacture of saltpetre, or to an order for the demolition or possession of the *diki*, or to any means profits, it is not clear that any question of past user is involved in the case.

In these circumstances, I am of opinion that this application should be allowed and the order of remand re-considered. And I hold—see *Reasut Hossein v. Hadjee Abdoolah* (1)—that it is open to me to admit the case to a review. I make no order as to costs.

The appeal was then, by direction of his Lordship, set down to be re-heard before him, on the 11th March, 1910. The following judgment was delivered on the 23rd March, 1910, by

1910.

March, 23.

Carnduff J.—This review of judgment arises out of a suit brought by Maharani Janki Koer in respect of the right of the Bettiah Raj to what is known as the Nimak Sayer Mehal of Sarkar Champaran. The opposite party (the defendant in the suit) are the proprietors of Mouza Manpura, which is in Champaran, and the case of the plaintiff, who is the petitioner now before me, was that they had infringed her right by preventing her licensees from collecting saltpetre-producing earth on their estate and by themselves establishing a manufactory or *diki*, and granting on their own account licenses for the manufacture of saltpetre. The Court of first instance was, in these circumstances, asked (a) to declare the petitioner's right to a monopoly in respect of the manufacture of saltpetre and the collection of saltpetre-producing earth in Manupara, (b) to issue an injunction restraining the opposite party from infringing that right; and (c) either to order the demolition of the *diki* or to put the petitioner in possession thereof.

(1) (1876) L. B. 8 I. A 221

The suit was decreed in full by the Munsiff and an appeal to the Subordinate Judge was dismissed. On second appeal to this Court, *Golab Chand v. Janki Koer* (1), it was frankly conceded on behalf of the respondent Maharani that none of the reliefs specified above, expressed as they were in terms of a monopoly, could lawfully be granted. It followed that the decree appealed against must be modified, and there seemed to my learned brother Mitra (since retired) and myself that there were three courses *prima facie* open to us, either (1) to allow the appeal, dismiss the suit and leave the respondent to bring, if so advised and if possible, a fresh suit properly framed ; or (2) to modify the decree ourselves ; or (3) to direct the remand.

The first of these courses I need hardly discuss on this petition. It would certainly not have suited the petitioner.

As regards the second, the only modification which we felt we could make on the materials before us, would have been to alter the decree so as to declare that the plaintiff as being the permanent settlement holder under the Government was entitled to the Nimak Sayer Mehal, whatever that might connote, of Sarkar Champaran (including Manpura), and to an injunction restraining the opposite party from interfering with that right, whatever it might be ; for there seemed to us to be no findings of fact by either of the Courts below sufficient to guide us in declaring, in the sense of defining, the petitioner's right. The learned Munsiff's finding amounts only to this that the petitioner is entitled to the monopoly claimed in her plaint and that admittedly cannot lawfully be decreed in her favour. The lower appellate Court, no doubt, described the Nimak Sayer Mehal as the royalty or revenue paid by the manufacturing *noonseahs* and found that the petitioner was the sole owner thereof, but that finding is indefinite, and it becomes still more so when reference is made to *Bengal Government v. Nawab Jafar Hossein Khan* (2), which the learned Subordinate Judge has accepted as giving a short history of this Nimak Sayer Mehal. From the judgment of the Privy Council in that case, and also from the correspondence copies of which have been furnished by the respondent and relied upon in support of her argument, it would seem that the Nimak Sayer Mehal is the State's share, three eighths, of the value of all saltpetre produced in the Sarkar, the manufacturing *noonseahs* being entitled to one-half and the petitioner of the soil to the remaining one-eighth. The zemindars in whose lands the saltpetre was produced, so runs the judgment

CIVIL.
1913.
Golab Chand
v.
Janki Koer
Carnariff J.

CIVIL.

1913.

Golab Chand

v.

Janki Koer.

Carnariff, J.

of Turner L. J., collected it from the *nooneahs* or manufacturers in kind, receiving from them about one half of the produce, of which the zemindars retained one-fourth and delivered the remaining three-fourths to the officers of the Government, and the same mode of collection and division seems to have prevailed after the Company's accession to the Dewany, except that the collection from the *nooneahs* and the subsequent distribution of it was made in money according to the actual current value of saltpetre. The public revenue thus consisted of three-fourths of the one-half which was received from the *nooneahs*, and apparently the right to this was the Nimak Sayer Mehal which was settled permanently by the Government with the petitioner's predecessor in interest. But there is no finding as to this, and Mr. Justice Mitra and I, thinking that the result of leaving the matter undecided by modifying the decree in the terms indicated above would be further litigation and the multiplicity of suits, elected the third course and made the order of remand which I am now asked to concede as uncalled for and unnecessary. Dr. Rash Behary Ghose contends that all that need and should be done is to alter the faulty language of the decree which follows the loose wording of the plaint and to make some such declaration as that the petitioner is entitled to the exclusive right to the use, for the manufacture of saltpetre, of all saltpetre-producing earth in Manpura. But he admits that the consequence (which he would welcome) would be that no saltpetre-producing earth could be collected until the opposite party and the *nooneahs* had come to terms with the petitioner.

This would of course place the petitioner in a position of great strength, but it would not settle the dispute by any means, for, as must be evident from what I have already said, the question would remain, whether she could impose her own terms unfettered or whether there are terms, so far undiscovered in this suit, under which the mehal was settled and by which she would be bound. Judging from what there is on the record, I am inclined to think that the latter is the true state of affairs; but the inevitable result of leaving the matter undecided would be another suit.

I am confirmed, then, in the belief that we were right in directing a remand and our order to that effect will therefore stand. The petitioner must bear the costs of the review which I assess at five gold mohurs.

Against this judgment, the plaintiff preferred an appeal under

clause 15 of the Letters Patent. At the hearing of the appeal, on the 27th May, 1913, it was argued that Mr. Justice Carnduff having admitted the review, the appeal was restored, and could be heard, only by the Division Bench in charge of the group to which the appeal belonged.

The following judgment was delivered by

Jenkins C. J.—We hold that the review was admitted; and, we further decide that Mr. Justice Carnduff was not competent to hear the appeal. His judgment must, therefore, be set aside, and the appeal from appellate decrees restored. We make no order as to the costs of this appeal.

As the appeal belonged to the Patna group, it would, after the above order, be heard by the Division Bench in charge of that group (N. R. Chatterjee and Walmsley JJ.). But, inasmuch as Mr. Justice Chatterjee, when at the Bar, had appeared for the plaintiff at various stages of these proceedings, the Chief Justice, upon the application of the parties, constituted a Special Bench, consisting of His Lordship himself and Mr. Justice Mookerjee, to hear the restored Appeal from Appellate Decree No. 1353 of 1907. Appeal No. 628 of 1908, which had stood adjourned, was set down to be heard at the same time.

Babu Golap Chandra Sarkar and Dr. Dwarka Nath Mitra for the Appellant in Appeal No. 1353.

Dr. Rash Behary Ghose, Babus Ram Charan Mitra and Manindra Nath Banerjee for the Respondent.

Babus Ram Charan Mitra and Manindra Nath Banerjee for the Appellant in Appeal No. 628.

Babu Golap Chandra Sarkar and Dr. Dwarka Nath Mitra for the Respondent.

C. A. V.

The judgment of the Court in the first appeal was delivered by

Jenkins C. J.—The subject of this litigation is the Nimak Sayar Mehal of Sarkar Champaran, to which the plaintiff, the present owner of the Bettia Raj, claims to be entitled. The defendant is the zemindar of the village Manpura, within the limits of which the plaintiff claims to exercise the rights that, in her view, appertain to and substantially constitute her mehal. The plaintiff's claim has been embarrassed by the unhappy language in which her plaint was originally framed, for, as expressed, it claims the affirmation of a monopoly. But, notwithstanding this, the substantial meaning of the document is fairly evident, though it might possibly,

CIVIL.

1913.

Golab Chand

Janki Koer.

1913.

May, 27.

July, 3.

CIVIL.

1918.

Golab Chand

Janki Koer.

Jenkins, C. J.

be misunderstood. We have accordingly allowed an amendment so that the plaintiff's claim might be formulated in happier and more precise language. It is a mistake to suppose that the plaintiff seeks a monopoly; all she really seeks is the affirmation and protection of an exclusive right in accordance with the mode in which it has been exercised by her and her predecessors for generations. The plaintiff asserts, and it is the fact, that this mehal was settled with a predecessor in title at the time of the Permanent Settlement. The defendant alleges, and it is also the fact, that the zemindari in the village Manpura over which the plaintiff claims these rights, was also settled at the Permanent Settlement.

The rights claimed by the plaintiff are to collect, either herself or by those claiming under her, nitrous earth throughout an extensive area, which includes village Manpura, in order to extract therefrom the saltpetre that it yields. The mode of operation is described in Harington's Analysis Vol. III and Sir William Hunter's Statistical Account of Bengal Vol. XIII. No separate or further right to this earth is claimed. The defendant maintains that this would be inconsistent with his zemindari rights and cannot be upheld. All that the plaintiff can claim, according to him, is the right to collect revenue, if saltpetre happens to be manufactured, a possibility of which he claims to be the sole arbiter—and nothing more. As authority for this view, *The Government of Bengal v. Nawab Jafur Hossein Khan* (1), has been cited to us, and no doubt it was said of the Nimak Sayar Mehal there in question that it was revenue. If by that is meant that every Nimak Sayar Mehal is a right to collect revenue, if any chanced to be earned, and nothing more, then we should of course follow the decision without question. But that is not how we read the decision, and we think this case must be determined on its own circumstances.

When considering the effect of a Permanent Settlement, the first matter to be determined is what were the assets of the estate, then settled, and here we have to consider what were the assets of the two estates, the zemindari and the Nimak Sayar Mehal. It is very necessary not to be influenced by the doctrines of English real property law, with its maxim *ejus est solum ejus est usque ad coelum et ad inferos*. On the settlement of estates in Behar, interests could be moulded in disregard of this maxim. Thus, in the well-known case of the Aurungs of Birbhum, *Goorooopershad Bose v. Bisnoochurn Heyra* (2), there

(1) (1864) 5 M. I. A. 467. (2) (1811) 1 Sel. Rep. 452.

was a separation of the Aurungs and the surface of the soil, and there were two separate estates, the zemindari and the *Loha mehal*. So again in *Byjnauth Mujmoodar v. Deen Dyal Gooput* (1), there was a similar separation of the zemindari and the *bunkur*, of the soil and the trees. We start here with the fact that there was a settlement of the zemindari and a separate settlement of the Nimak Sayer Mehal, and further that the assessment on it shows that the mahal was of considerable value. What passed under this settlement cannot have been of the precarious character suggested on behalf of the defendant, for it was argued that the plaintiff had no right to come on to the land except by the leave and license of the defendant, much less to authorize others to utilize the nitrous soil for the collection of saltpetre. The plaintiff in that case would be in a sorry plight: she is under an obligation to pay a considerable revenue to the Government in respect of the mehal but would have no right, except on sufferance, to make the mehal a source of profit for the discharge of that revenue. This appears to us to be an untenable position that is taken up by the defendant, a recent purchaser of the zemindari. It is an innovation which has originated with him and offends the principle that a grant carries with it the means reasonably necessary for its enjoyment. *Cuiusque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit.** Both the litigants claim under the same grantor; both grants date from the Permanent Settlement and must have been intended to be effective; and yet, if the defendant's view be right, the grant of the Nemak Sayer Mehal would have been deceptive and in a large measure futile. The answer to his contention is that the Nimak Sayer Mahal was no part of the assets of the zemindari. It is interesting to note that even in England a separate right in respect of saltpetre has been recognised. It was held in *The Case of the King's Prerogative in Saltpetre* (2), that the King had a prerogative entitling him to enter into any man's land and dig saltpetre for making gunpowder. In Bacon's Abridgement, Vol. VI p. 416, the result of the case is summarised as follows: "My Lord Coke observed, (1), that it must be done with as much conveniency and as little to the prejudice of the owner of the ground as possible; and consequently that the digging in a man's house, barn, outhouse, &c., or weakening the walls of any such house, &c. was unlawful; (2) that the soil or ground must

(1) (1814) 2 Sel. Rep. 188

(2) (1607) 12 Co. 12.

* Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect—Rep.

CIVIL

1918.

Golab Chaud

Janki Koer.

Jenkins, O. J.

CIVIL.

1918.

Golab Chand

Janki Koer.

Jenkins, C. J.

be made and left as commodious to the owner as it was before : (3) that it was in the nature of a purveyance and an incident inseparable to the Crown and could not be granted or demised over to another : (4) that the owner of the land could not be restrained from digging and making saltpetre ; the King not having an interest in it as he had in gold and silver in the land of the subject.

The third and fourth of these observations afford no guide in this case, for the right to dig saltpetre has been made a separate estate, as could lawfully be done, and is not an asset of the zemindari estate. The first and second observations are instructive as illustrating what appeared to eminent judges to be a reasonable mode of exercising the right.

But it is still more instructive to turn to the judgment itself, where matters are discussed in more detail, and the points there indicated were resolved by them all *una voce*. Thus it was resolved that the King "may dig for saltpetre for this that the ministers of the King who dig for saltpetre are bound to leave the inheritance of the subject in so good a plight as they found it."

Further it was resolved, "The ministers of the King cannot undermine, weaken or impair any of the walls or foundation of any houses, be they mansion houses or outhouses or barns, stables, dovehouses, mills or any other buildings ; and they cannot dig in the floor of my mansion house which serves for the habitation of man ; for this that my house is the safest place for my refuge safety and comfort and of all my family as well in sickness as in health, and it is my defence in the night and in the day against felons, mis-doers, and harmful animals ; and it is very necessary for the weal public, that the habitation of subjects be preserved and maintained." Later it is said, "Also the ministers of the King cannot dig the floor of any barn employed for the safe custody of any corn, hay &c. of the owner for that the floor of a barn cannot be made dry and serviceable again in a long time : but they may dig in the floors of stables and ox-houses so that there be sufficient room left for the horses and other cattle of the owner : and so that they repair it in convenient time in so good plight as it was before ; also they may dig in the floors and cellars of vaults, so that there be sufficient room for the necessities of the owner ; and so that the wine, beer and other necessary provisions of the owner be not removed or in any sort impaired. And they may dig any mud walls which are not the walls of any mansion house, so that

order be taken that the mansion house be well defended as it was before, and so they may dig it in the ruins and decays of any house or buildings which are not preserved for the necessary habitation of men. They ought to make the places in which they dig so well and commodious to the owner as they were before.....They ought to work in the possession of the subject, but betwixt sunrising and setting; so that the owner may make fast the door of his house and put in defence against mis-doers.....They ought not to place or fix any furnace vessels or other necessities in any house or building of the subject without his consent or so near any mansion house, as by it, it may receive prejudice or disquiet. They ought not to continue in one place over a convenient time, nor to return again to the same place before convenient time (which is long time) be passed."

I have cited at length from this interesting judgment, not because it is in any sense conclusive of this case, but because it presents a fair picture of what would be a reasonable user under the right to dig and take saltpetre in the ground of another, though, it is obvious, in some respects it speaks of matters which are foreign to the conditions of this country. It is also interesting to note that after this case had been decided in 1607, to facilitate operations by saltpetremen, King Charles I forbade paving or bricking of dove houses or stables, ordering that floor should be of good mellow earth and that saltpetremen should not be hindered (Selden Society, Select Charters, Vol. 28, Introduction p. LXXX). Where private ownership was thus invaded, machinery for compensation was set up, and it was directed that differences of compensation were to be settled before two neighbouring Justices (p. LIX). Subsequently, in the Charter granted to the Saltpetre Company in 1693, during the reign of William and Mary, it was expressly provided that the grantees were not to be deemed to have power to enter into or dig or break up any messuages, houses, outhouses, pigeon-houses, ox-houses, stables, stalls or the lands or grounds of any subject of Their Majesties without the consent of the owners or possessors thereof, first freely had and obtained. (Selden Society, Vol. 28, Select Charters of Trading Companies, p. 234 at page 237). In the case before us, the two estates were separately and independently created, as we have seen, at the time of the Permanent Settlement; consequently the proprietor of the Nimak Sayar Mehal is entitled to enter on the land,

CIVIL.

1918.

Golab Chand

v.

Janki Koor.

Jenkins, C. J.

CIVIL.

1918.

Golab Ohand

Janki Koer.

Jenkins, C. J.

comprised in the estate of the defendant and exercise thereon in a reasonable manner the rights vested in her under the grant.

I therefore hold that the plaintiff is entitled to a declaration that she is the owner of the Nimak Sayer Mehal of Sarkar Champaran and that by virtue thereof she, her agents; servants and workmen, lessees and licensees are entitled to enter on the land of village Manpura described in the plaint, and to exercise an exclusive right to dig for saltpetre, but so that this be done with as little inconvenience and prejudice as possible to the defendant as the owner of the village, and that the ground be made and left as commodious to the defendant as it was before. And there should be an injunction restraining the defendant from interference with the reasonable exercise of this right.

As the plaint in its original form occasioned the prolongation of this litigation, the plaintiff must pay the costs throughout.

The same decree will be passed in the other appeal.

A. T. M.

Appeals allowed; suits decreed.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice and
Sir Asutosh Mookerjee, Knight, Judge.*

DURGA SUNDARI SEN GUPTA

v.

RAMKRISHNA PODDAR.*

CIVIL.

1918.

May, 27.

*Hindu widow, if can devise property inherited from husband with consent of
next reversioners.*

A Hindu widow cannot with the consent of the next reversioners bequeath properties inherited by her from her husband so as to confer an absolute title upon the devisee.

Appeal by the Plaintiff.

Suit for a declaration of devisee's (plaintiff's) title to the devised properties and for a declaration that the properties were not liable to be attached and sold in execution of the mortgage decree of the principal defendant, the respondent, obtained against the defendants Nos. 2 to 4 and father of defendant No. 5. The respondent after selling the mortgaged property, attached the property in dispute as belonging to his mortgagors for the

* Letters Patent Appeal No. 162 of 1911, under section 15 of the Letters Patent, against the decision of Mr Justice N. Chatterjee, dated the 29th August, 1911, in Appeal from Appellate Decree No. 2852 of 1909, against the decree of G. N. Roy, Esq., District Judge of Tippera, dated 1st November, 1909, affirming that of Babu Madan Mohan Saha, Munsiff, 2nd Court of Ohandpur, dated the 22nd June, 1908.

balance due under the decree. The plaintiff preferred a claim, which was dismissed. The suit was dismissed by the Courts below. The appeal to the High Court, was heard on the 6th July, 1911.

The following judgment was delivered by

N. Chatterjee J.—The question raised in this appeal is whether a Hindu widow can with the consent of the next male heirs of her husband bequeath properties inherited by her from her husband so as to confer a title upon the devisee.

It appears that one Sarada Sundari Dasi inherited certain properties as heiress of her husband Kashi Chandra. She executed a will with the consent of her husband's reversioners whereby she bequeathed the property in dispute in favour of the plaintiff in the present case who is the wife of one of the reversioners.

The defendant No. 1 obtained a mortgage decree against the defendants 2 to 4 and the father of defendant No. 5 and after the sale of the mortgaged property attached the property in dispute as belonging to them for the balance due under the decree. Thereupon the plaintiff preferred a claim to the properties basing her title upon the will of Sarada Sundari. The claim having been disallowed she brought the present suit for a declaration of her title to the properties under the will and for a declaration that the properties were not liable to be attached and sold in execution of the decree of the defendant No. 1.

Both the Courts below have dismissed the suit and the plaintiff has appealed to this Court. The title of the plaintiff depends upon the validity of the will of Sarada Sundari.

It is now well-settled that a Hindu widow can with the consent of the next reversionary heir transfer *inter vivos* the estate inherited by her so as to confer an absolute title on the transferee (see *Bajrangi Singh v. Manokarnika Baksh Singh* (1)). A Hindu widow can also dispose of her *stridhan* property by will to the same extent as she can dispose of it during her life-time, in other words the power of devise is co-extensive with the power of gift. The principle, however, upon which a transfer *inter vivos* by a Hindu widow with the consent of the nearest reversioners passes an absolute title to the transferee cannot apply when inherited properties are sought to be bequeathed by will. During her life-time the widow may relinquish her estate in favour of the next male heir of her husband, the

CIVIL

1918.

Durga Sundari

Ramkrishna Poddar.

1911.

August, 29.

(1) (1907) L. R. 35 I. A. 1; 1 L. R. 80 All. 1.

CIVIL

1918.

Durga Sundari

v.

Ramkrishna Poddar.

N. Chatterjee, J.

succession is thereupon accelerated and the reversioner gets an absolute estate, who can thus convey an absolute title to another, and it follows as a logical consequence that the same result may be obtained by the next reversioner joining with the widow, in alienating the property to another, or by giving his consent to an alienation by the widow. A will however can operate only on death, and the interest of a Hindu widow in properties inherited by her ceases on her death, and there is thus nothing left upon which her will can operate. At the time when the will comes into operation, she has no right whatever and she cannot dispose of by will of what does not belong to her. The reversioners during the life-time of the widow have no interest which they can dispose of by will and their consent at a time when the widow has ceased to have any interest cannot have the effect of passing any title to the property. On her death the properties vest in the reversionary heirs and they are then the only persons who can deal with the properties. I do not see how the widow who has an interest in the property only during her life-time which she does not dispose of, and the reversioners who have no present interest and whose interest will come into existence after the death of the widow can jointly make a will, and if they can not jointly make a will, how the consent of the reversioners to such a will executed by a Hindu widow can make it valid.

I am accordingly of opinion that the consent of the reversioners cannot make a will executed by a Hindu widow with respect to properties inherited by her valid so as to confer any title upon the devisee.

It was however contended on behalf of the appellant that even if Sarada Sundari had no power to dispose of immoveable properties inherited by her by will in favour of the plaintiff, she had bequeathed by the same will her movable properties to the reversioners, and they having elected to confirm the dispositions by accepting the bequest as to movables, the defendant No. 1 the creditor who does not stand in a better position than the reversioners is also bound by the election, and the case of *Mangaldas v. Ranchhoddas* (1) is relied upon in support of the contention.

The question was not raised in the Courts below and it depends upon facts which have not been gone into. I do not think however there is any force in the contention.

In the Bombay case a Hindu widow died making a will

(1) (1889) I. L. R. 14 Bom. 438.

of property which came to her on the death of her husband. She bequeathed Rs. 2,000 to the plaintiff and the immovable property to the defendant's father. The plaintiff and the defendant's father were the heirs of her husband. The plaintiff sued for the legacy under the will and for half of the immovable property as heir. It was held that the plaintiff having elected to take the legacy could not get one-half of the immovable property. But in Bombay the current of authorities is in favour of the widow's absolute power of disposal over inherited movable properties (see Mayne's Hindu Law, 7th Edition, page 869), whereas in Bengal the widow's power of disposal of movable properties inherited by her is the same as her power with regard to immovable property similarly inherited (see *Durga Nath Pramanik v. Chintamani Dassi*) (1). It is not suggested that the movable properties bequeathed by Sarada Sundari were her *stridhan* properties. That being so, she had no power of disposal over either the movable or immovable properties which devolved upon the reversioners upon her death and the Bombay case cited above and the doctrine of election have no application to the present case.

Some contentions were raised with reference to the findings of the Courts below about the will and the consent of the reversioners not being *bona fide*, the probate proceedings being collusive, and other matters dealt with by Courts below, but having regard to the view taken above I do not think it necessary to deal with them.

The appeal is dismissed with costs.

Against this decision, the plaintiff appealed under section 15 of the Letters Patent.

Babu Sasadhar Roy for the Appellant,
Babu Gopal Chandra Das for the Respondent.

The judgment of the Court was delivered by

Jenkins C. J.—We dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

May, 27.

(1) (1908) 1 L. B. 31, Calo. 214.

CIVIL
 1913.
Durga Sundari
 v.
Ramkrishna Poddar.
N. Chatterjee, J.

Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice and
Sir Asutosh Mookerjee, Knight, Judge.

KESHWAR BHAGAT

v.

SHEO PROSAD LAL AND OTHERS.*

Presumption—Rent-free—'Belagan', entry of, in settlement record—'Kabillagan'
—'Lakheraj.'

The entry *belagan* in a settlement record, while it may be indicative of a *tenara*, also shows that no rent in fact was paid, and makes no pronouncement either way as to liability to pay rent.

The expression '*Kabillagan*' describes a tenancy for which rent is not actually paid but which is liable to pay rent.

The word *lakheraj* is often used loosely; in strictness, it indicates a freedom from liability to revenue, but it is constantly used as indicating exemption from liability to pay rent.

A Court may, from evidence of long and uninterrupted possession without payment of rent, presume a grant of land under conditions which make it rent-free, though it may not be revenue free.

Appeal under section 15 of the Letters Patent by the Defendant.

Suit to obtain possession of certain land as being the plaintiff's *serait* land and, in the alternative, for assessment of rent thereon. In the Record of Rights, it was recorded that the defendant held it as a raiyat or tenant under the plaintiff, but that it was *belagan*. The primary Court proceeded to assess it with rent. On appeal, the plaintiff's suit was dismissed. On second appeal by the plaintiff, the following judgment was delivered by

Casperas J.—This appeal arises out of a suit brought by the plaintiff to obtain possession of some land as being his *serait* (private) land, and, in the alternative, he prayed for assessment of rent thereon. In the Record of Rights, there are two entries against this land.

It was recorded that the defendant held it as a raiyat, or tenant, under the plaintiff, but that it was *belagan*, that is to say, not assessed with rent at the time when the record was prepared. The finding cannot be impugned that the land is not *serait* land of the plaintiff. The first Court, however, proceeded to assess it with rent. On appeal, the District Judge attached little or no importance to the Record of Rights, on the ground that the entries were conflicting, and he placed the onus of proof

*Letters Patent Appeal No. 5 of 1911 under section 15 of the Letters Patent, against the decision of Mr. Justice Casperas, dated the 6th December, 1910, in Appeal from Appellate Decree No. 1837 of 1909, against the decree of H. Foster, Esq., District Judge of Saran, dated the 23rd March, 1909, reversing that of Mr. S. N. Ahmad, Munsiff of Sewan, dated the 7th September, 1908.

CIVIL.

1918.

May, 29.

1910.

December, 6.

on the plaintiff, with the result that, because the plaintiff had not received any rent for a very long time, he was not entitled to have any rent now assessed on the land in question. In this view of the matter, he dismissed the plaintiff's suit.

In second appeal, it has been urged, on behalf of the plaintiff, that the land being, admittedly, within the zemindari of the plaintiff, and the defendant being his tenant, the word *belagan* merely implies that the land, though not assessed, was assessable with rent. In my opinion, the decision of the District Judge cannot be supported. A variety of reported cases have been cited and discussed at the Bar. I may mention the following cases in this connection; *Hurryhur Mookhopadhya v. Madub Chunder Baboo* (1), *Batai Ahir v. Bhuggobutty Koer* (2) and *Sheik Milan v. Mohamed Ali* (3).

No doubt the *onus* of proof was upon the plaintiff, but that fact does not relieve the defendant from adducing evidence to rebut the presumption that arises from the entries in the Record of Rights. The relation between landlord and tenant, admittedly, exists between the parties upon that presumption, and, although the defendant may have never paid any rent, it does not follow that he will never be liable to discharge that obligation to the landlord. No suit was brought to contest the entries in the Record of Rights. The defendant failed to produce any *sanad* or to rebut the presumption of correctness attaching to the Record.

The learned vakil for the defendant has relied, in support of the District Judge's judgment, upon Article 130, Schedule II of the Limitation Act. That Article provides a period of limitation of 12 years for the resumption or assessment of rent-free land, the period running from the date when the right to resume or assess the land first accrues. But the obligation to pay rent is a recurring obligation accruing daily in favour of the landlord. In my opinion, Article 130 has no concern with the circumstances of the present litigation.

But nothing has been decided, in the judgment of the lower appellate Court, as regards the assessment of rent, except that the average struck by the Munsiff is open to objection.

The decision of the District Judge is reversed. The case must go back to the lower appellate Court for a determination of the fair rental to be imposed on the land in suit. The plaintiff claimed rent at Rs. 8-8 a bigha. His witness put it at 8

CIVIL.

1918.

Keshwar Bhagat

v.

Bheo Prasad.

Casperes, J.

(1) (1871) 14 M. I. A. 152.

(2) (1882) 11 O. L. B. 476. (3) (1908) 10 O. W. N. 484.

CIVIL.

1918.

Keshwar Bhagat

v.
Shao Prasad.

Caspersz, J.

rupees 2 bigha, and the defendant's witness Uttim Chand Lal deposed to 3 rupees a bigha being the fair rate. Upon these and the other materials in the record, the District Judge must arrive at his own conclusion, and give the plaintiff a decree for the rental which he may deem fair.

The plaintiff must pay the costs up to the present stage. Further costs will be in the discretion of the District Judge.

Against this decision, the defendant preferred an appeal under section 15 of the Letters Patent.

Babus Provas Chandra Mitter and Surendra Madhub Mullick for the Appellant.

Babu Lakshmi Narayan Singh for the Respondent.

The judgment of the Court was delivered by

May, 29.

Jenkins C. J.—This is an appeal from a judgment of Mr. Justice Caspersz, and it raises the question whether the defendant's holding is liable to assessment for rent. The plaintiff is the zemindar, and in the Record of Rights there is an entry of this particular holding in the name of the defendant, but as *belagan*. From a very useful publication, being a Guide and Glossary to the Survey and Settlement Operations in Behar, we learn the sense in which the Settlement Officers use the term *belagan*. It indicates a rent-free tenure: and it is explained that *belagan* means simply "not paying agricultural rent" and does not imply anything as to liability to pay rent. This is in contrast with the expression "*kabillagan*", also to be found in the same glossary, which describes a tenancy for which rent is not actually paid but which is liable to pay rent. In this case the defendant pleaded a *lakhiraj* title. The word *lakhiraj* is often used loosely—in strictness it indicates a freedom from liability to revenue, but it is constantly used as indicating exemption from liability to pay rent, and it may fairly be taken in this case that the defendant did plead a freedom from liability to pay rent. The decision of the lower Court of appeal was that the plaintiff had failed to prove that the land was subject to rent; and the learned Judge consequently allowed the appeal and set aside the decree of the lower Court. Mr. Justice Caspersz on appeal has reversed that decree and sent back the case to the lower appellate Court for a determination of the fair rental to be imposed on the land in suit. It is from this determination that the present appeal has been preferred,

In my opinion this appeal must succeed, for I think the finding of the lower appellate Court is conclusive in this case. It has been argued before us that the entry *belagun* is decisive in favour of the zemindar. I fail to see that. The significance of the entry is indicated in the Glossary to which I have already drawn attention, and it is apparent from this, that while it may be indicative of a *tenure*, it also shows that no rent in fact was paid and makes no pronouncement either way as to liability to pay rent. It cannot therefore be said that the determination of the District Judge in any way conflicts with the entry in the Record of Rights. His judgment rests on a familiar rule of law, which has not been disputed before us, and in accordance with which the Court may, from evidence of long and uninterrupted possession without payment of rent, presume a grant of land under conditions which make it rent-free, though it may not be revenue-free. The difficulty in this case has largely arisen from a failure to distinguish between *rent-free* and *revenue-free*. It is no doubt true that freedom from revenue cannot now be effectively created; but the decision of the Full Bench in *Mahomed Atil v. Asadunmissa Bibee* (1) and more particularly that portion of Sir Barnes Peacock's judgment which is reported at pages 41 and 61, makes it clear that there can be a rent-free grant of permanently-settled land and such a grant cannot be treated as a nullity by the grantor or his heirs or by any person claiming through him. The zemindar in this case cannot claim the position of advantage which would have accrued to him had, he been the purchaser at a revenue sale, and we have to decide this case apart from that; and so regarding it, I think we must hold that the learned Judge of the lower appellate Court was entitled to make the presumption he did, and that as a result we ought to decide that the appellant before us holds the land free from liability to rent.

We must, therefore, set aside the judgment of Mr. Justice Caspersz and restore the decree of the District Judge, with costs of this hearing and of the hearing before Mr. Justice Caspersz.

A. T. M.

Appeal allowed: suit dismissed.

(1) (1867) 9 W. R. 1; B. L. R. Sup. 774.

CIVIL.

1918.

Keshwar Bhagat

Shoo Promod.

Jenkins, C. J.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice and
Sir Asutosh Mookerjee, Knight, Judge.*

BANKO BEHARY DAS AND ANOTHER

v.

KRISHNA CHANDRA BHOWMICK AND OTHERS.*

CIVIL.

1918

May, 28.

*'Plantation'—Betel-leaf—Protected interest—Bengal Tenancy Act (VIII of
1895), Secs. 100, 167—'Date of sale.'*

The word 'plantation' in section 160, cl (c), of the Bengal Tenancy Act is one of wide significance and includes an assemblage of growing plants of any kind that have been planted. Whether or not a particular assemblage of plants comes within this, is largely, if not exclusively, a question of fact. A betel-leaf *boraj* may be a 'plantation' within the meaning of section 160.

Per N. Chatterjee J.—The words 'date of sale' in section 167 of the Bengal Tenancy Act mean the date on which the sale is confirmed.†

Appeal by the Plaintiffs.

Suit for ejectment.

The suit was dismissed in the Courts below. The plaintiffs preferred an appeal to the High Court, which was heard on the 5th January, 1911. Two questions were raised in the second appeal. The *first* was "whether a lease of land in which *boraj* or betel-leaf plantations have been made is a protected interest within the meaning of section 160 clause (c) of the Bengal Tenancy Act", and the *second*, "whether the words 'date of sale' in section 167 of the Bengal Tenancy Act mean the date on which the sale is held or the date on which the sale is confirmed."

Moulvi Syed Shamsul Huda and Babu Narendra Kumar Bose for the Appellants.

Babus Kishori Lal Sarkar and Debendra Nath Bagchi for the Respondents.

The following judgment was delivered by

N. Chatterjee J.—Two questions have been raised in this appeal. The *first* is whether a lease of land on which *boraj* or betel-leaf plantations have been made is a protected interest within the meaning of section 160 clause (c) of the Bengal Tenancy Act, and the *second*, whether the words 'date of sale' in section 167 of the Act mean the date on which the sale is held or the date on which the sale is confirmed.

With regard to the first question, it is urged that the

* Letters Patent Appeal No. 45 of 1911 under section 15 of the Letters Patent, against the decision of Mr. Justice N. Chatterjee dated the 18th February, 1911, in Appeal from Appellate Decree No. 587 of 1909, against the decree of Babu Mohini Mohan Dutt, Subordinate Judge of Faridpur, dated the 18th January, 1909, affirming that of Babu Probodh Chandra Roy, Officiating Munsiff, 2nd Court at Goalundo, dated the 10th August, 1908.

† But see *Yusuf Gazi v. Payarannasa Bawa* (1912) 16 C. L. J. 181—Rep.

1911.
February, 13.

word 'plantations' is governed by the word 'permanent' in section 160 clause (c) and that betel-leaf cultivation cannot be called a plantation which implies permanency in the plant and that betel-leaf does not stand on a different footing from other vegetables.

I do not think that the word 'permanent' governs the word 'plantations' in the section. If it applies to 'plantations', it would equally apply to the words which follow, *viz.* "tanks, canals, places of worship or burning or burying grounds." But it seems, that the word 'permanent' is not used with reference to them because they in themselves imply some sort of permanency.

Nor do I think that the word 'plantations' necessarily means permanency in the plant, though I think it implies permanency in the nature of the work.

The nature of the betel-leaf cultivation in the present case has not been fully gone into by Courts below, but ordinarily in betel-leaf cultivation, the ground has to be raised and bamboo and reed structures have to be made for protecting the plants, and all this cannot be done at a small cost. It does not stand on the same footing as other vegetable cultivation. The *boroj* in the present case has been found to have been erected and existing for considerably over 12 years. The word 'plantations' is not defined in the Act.

I think that land on which a *boroj* is made is a protected interest within the meaning of section 160 of the Bengal Tenancy Act.

The second contention turns upon the meaning to be attached to the words 'date of sale' in section 167 of the Act, and the question is whether the words mean the date on which the sale is confirmed. It has been urged on behalf of the appellant that the former construction would be unreasonable and may cause hardship in many cases. I think there is much force in this contention. An application may be made for setting aside a sale and the proceedings may not be disposed of before the expiry of one year from the date of sale. The purchaser, according to the former construction, must take steps under section 167 within one year from the date of sale while the proceedings for setting aside the sale are pending, and though the sale may eventually be set aside. Again a sale may be set aside before the expiry of one year from the date of sale and an appeal may not be disposed of within one year. In such a case also, the purchaser according to the above

Orvill.

1918.

Banko Bahary
v.
Krishna Chandra
N. Chatterjee, J

O. RIVIN.

1918.

Banko Behary

v.

Krishna Chandra

N. Chatterjee, J.

construction must apply under section 167 before the order setting aside the sale is reversed and the sale is confirmed on appeal.

Besides, the mere filing of an application is not enough. He must pay process fee and request the Collector to serve a notice on the incumbrancer declaring that the incumbrance is annulled. It is not clear how all these proceedings can be taken while the order setting aside the sale itself remains unreversed.

The words 'date of sale' also occurred in section 169 of the Act, and it was held in the case of *Matangini Chaudhurani v. Sreenath Das* (1), that the said words mean the date of 'confirmation of sale.' That section lays down rules for disposal of sale proceeds, and the question to be considered in that case was whether the landlord is entitled to the rent between the date of the suit and that of sale or up to the date of confirmation of sale. Under Act XIV of 1882, the title to the property did not vest in the purchaser until the sale was confirmed, and the Court held that having regard to the object of the section, it would be a narrow construction to say that the date of sale means the actual date of sale as opposed to the date when it becomes absolute.

Section 169 was amended by substituting the words 'date of confirmation of sale' in place of the words 'date of sale', but the same expression in section 167 was not amended.

In section 65 of the new Civil Procedure Code, Act V of 1908, it is laid down that where a sale has become absolute, the properties sold shall be deemed to have vested in the purchaser from the date when the property is sold and not from the date when the sale becomes absolute.

The present case must, however, be decided upon the law as it stood in April, 1905, when the sale took place. Section 169 was amended subsequently by Act I. (E. B. C.) of 1908.

The words 'date of sale' occurred in both the sections 167 and 169, and at the time of the sale in the present case, the title to the property did not vest in the purchaser until the sale was confirmed, and the words 'date of sale' in section 169 were judicially interpreted at that time to mean the date of confirmation of sale, and I think that the same construction should be put upon the words 'date of sale' in section 167. In the case of *Chowdry Kesa Sahay Singh v. Giani Roy* (2), Maclean C. J., agreeing with Ghose J. held that the words 'date of sale' in section 310A of the Civil Procedure Code mean the date on which the sale is actually held and not the date on which it is confirmed. But as pointed out by Maclean C. J. in his referring

(1) (1903) 7 C. W. N. 532 (2) (1902) 6 C. W. N. 776; I. L. B. 29 Calc. 626.

order in the case of *Chundi Charan v. Banke* (1), section 310A affords a special indulgence to the judgment-debtor. It gives him so to say yet one more chance of saving his property. But he can only avail himself of that special indulgence if as a condition precedent he makes the deposit within 30 days. It is urged that section 167, Bengal Tenancy Act, also gives a special indulgence to the purchaser, but I do not think that is so. Before the Bengal Tenancy Act, VIII of 1885, the purchaser had not to give any notice for avoiding an incumbrance or do any act before bringing the suit for possession, and there was no restriction as to the time within which the suit was to be brought, except the period fixed by the Limitation Act, see *Unnoda Churn Das v. Mothuranath Das* (2), though incumbrances were not *ipso facto* void by the sale but were voidable at the option of the purchaser; see *Titu Bibi v. Mohesh Chunder Bagchi* (3). The Bengal Tenancy Act, for the first time, laid down that the purchaser must give notice for annulling the incumbrance and within a limited time. His rights were therefore restricted by the Act.

In view however of my finding upon the first question, the plaintiff cannot succeed in the present case and the appeal is accordingly dismissed with costs.

Against this decision, the plaintiff preferred an appeal under section 15 of the Letters Patent.

Babus Mahendra Nath Roy and *Narendra Kumar Bose* for the Appellants.

Babus Kishori Lal Sarkar and *Debendra Nath Bagchi* for the Respondents.

The judgment of the Court was delivered by

Jenkins C. J.—This litigation turns upon the meaning to be attributed to the word 'plantation' in section 160 clause (c) of the Bengal Tenancy Act. The word is one of wide significance and would include an assemblage of growing plants of any kind that have been planted. The policy of the section is obvious, and as to whether or not a particular assemblage of plants comes within this must be largely, if not exclusively, a question of fact, and it appears to us that we cannot on the materials before us say that the lower Court of appeal was in error when it determined that that with which we are concerned in this case was a *plantation* within the meaning of section 160. We must accordingly dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

(1) (1899) I. L. B. 38 Calo. 449. (2) (1879) 4 Q. L. B. 6; I. L. B. 4 Calo. 860.
(3) (1888) I. L. B. 9 Calo. 688.

CIVIL.

1918.

Banko Behary

Krishna Chandra.

N. Chatterjee, J.

May, 28.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.*

ABINAS CHANDRA CHOWDHURY

v.

PURNANANDA KHAN AND OTHERS.*

CIVIL

1918,

May. 27.

Putni tenure—Sub-division—Rent receipts showing shares of tenants and rent.

Where the shares of the tenants in the *putni* as well as those of rent payable by each in his own share are separately shown in the rent receipts granted to several tenants.

Held, that the rent payable by different tenants is distributed amongst them and that there is a sub-division of the tenure consented to by the landlord.

Pyari Mohan v. Gopal Patil (1) followed.

Appeal by the Plaintiff.

Suit for rent by the common manager to the estate of Dihi Kholabaria, against several tenants in respect of a *putni* tenure. The question was whether the suit was maintainable. The lower Appellate Court held that the suit was not maintainable, as against all the defendants. The plaintiff appealed to the High Court.

Babu Hara Prosad Chatterjee for the Appellant.

Babus Sarat Chandra Roy Chowdhuri, Brojo Lal Chakrabarti, Ramakanta Bhattacharjee and Shyama Charan Roy for the Respondents.

The following judgment was delivered by

1911.
January, 6.

N. Chatterjee J.—The appeal arises out of a suit for rent against several tenants in respect of a *putni* tenure. Both the Courts below have thrown out the plaintiff's suit on the ground that the plaintiff having granted receipts to several tenants separately, a joint suit against all the tenants for recovery of *putni* rent was not maintainable. The lower appellate Court has found that the rent receipts granted to the defendants show their names as tenants, the rents originally payable and that which has now been allotted to each of the tenants for their respective shares: in other words, the shares of the tenants in the *putni* as well as the shares of the rent payable by each in his own share are separately shown in the rent-receipts. Under these circumstances, the lower appellate Court came to the

* Letters Patent Appeal No. 21 of 1911 under section 15 of the Letters Patent, against the decision of Mr. Justice N. Chatterjee, dated the 6th January, 1911, in Appeal from Appellate Decree No. 242 of 1909, against the decree of Babu Raj Narain Mukhopadhyay, Subordinate Judge of Rajshahy, dated the 23rd September, 1908, modifying that of Babu Jadab Chandra Bhattacharjee, Munsiff of Natore, dated the 18th June 1907.

conclusion that the rent payable by the different tenants was distributed amongst them and that there was a sub-division of of the tenure consented to by the landlord.

The case is clearly governed by the case of *Pyari Mohun Mukhopadhyaya v. Gopal Paik* (1) decided by the Full Bench of this Court.

The appeal is dismissed with costs.

The plaintiff appealed under section 15 of the Letters Patent.

Babus Dwarka Nath Chakravarti and Hara Prosad Chatterjee for the Appellant.

Babus Sarat Chandra Roy Chowdhuri, Brojo Lal Chakrabarti, Ramakanta Bhattacharjee and Shyama Kant Roy for the Respondent.

The judgment of the Court was delivered by

Jenkins C. J.—The appeal is concluded by the finding of the learned Subordinate Judge who from certain documents before him to which he gave very careful consideration came to a conclusion as to the intention of the grantor. Their view was accepted by Mr. Justice Chatterjee, and we see no reason to think that he is incorrect.

We must therefore dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

(1) (1898) L. L. B. 25 Calo. 581.

*Before Sir Lawrence Jenkins, K. C. J. E., Chief Justice,
and Mr. Justice Roy.*

MANOHOR MUKHERJEE

v.

PARESH CHANDRA MUKHERJEE AND ANOTHER.*

Bengal Tenancy Act (VIII of 1885, as amended by Act I of 1907, B. O), Secs. 53, 67, and 178, sub-sec. (3), cl (h)—Contract to pay rent in monthly instalments, whether valid—Interest on each instalment from the date it falls due, how far valid.

A contract between a landlord and a tenant for payment of rent in monthly instalments is valid, and is in accord with the provisions of the Bengal Tenancy Act; but a stipulation for payment of interest on each instalment from the time when it falls due, being in excess of that which can be permitted under the law (that is, twelve and a half per cent. per annum), is illegal and cannot be enforced, inasmuch as the landlord is only entitled to the interest secured to him by section 67 of the Act.

* Appeal from Appellate Decree, No. 8067 of 1911, against the decree of Babu Bidhu Bhushan Banerjee, Subordinate Judge, 2nd Court, District Hughly, dated the 29th June, 1911, modifying the decree of Babu B. B. Mitra, Munsiff, 1st Court, at Serampore, dated the 5th December, 1910.

CIVIL.

1918.

Abinash Chandra

v.

Purnananda,

N. Chatterjee, J.

May, 27.

CIVIL.

1918.

April, 23.

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1913.

Manohar

Parash.

April, 23.

Hemanta Kumari Debi v. Jagadindra Nath Roy Bahadur (1) distinguished.

Appeal by the Plaintiff Manohar Mukherjee.

This appeal arose out of a suit brought by the plaintiff landlord for recovery of arrears of rent with interest thereon, claimed on the basis of a contract entered into with the tenant defendant after the passing of the Bengal Tenancy Act. By that contract it was provided that rent would be paid in monthly *kists* or instalments, and interest would be paid on each instalment, from the time when it fell due. The defence was that the contract could not be enforced against the tenant, that the landlord was not entitled to receive 12 per cent. per annum from the date when each *kist* fell due, inasmuch as such a provision for payment of interest would be in excess of that which could be permitted under the law, and that interest would run from the expiration of that quarter of the agricultural year in which the instalment fell due.

Babu Bepin Beharry Ghose (Jr.) (with him *Babu Harendra Krishna Mukherjee*) for the appellant. According to the terms of the contract rent is payable in monthly *kists* or instalments, and interest should run on the arrears of rent from the time when it falls due, i. e., the expiration of every month. Literal effect should be given to the provisions of the contract. Section 53 of the Bengal Tenancy Act supports me. Section 67 of the Act has no application to the present case, as it relates only to those cases where a contract between the parties provides for quarterly *kists*: See the Privy Council case of *Hemanta Kumari Debi v. Jagadindra Nath Roy Bahadur* (1). Section 178 sub-section (3) cl. (A) controls only the rate of interest; see *Narendra Kumar Ghose v. Gora Chand Fodder* (2). The landlord is at any rate entitled to interest at the rate of $12\frac{1}{2}$ per cent. If section 67 applies to the case it will be a great hardship on the landlord; see also section 147 of the Bengal Tenancy Act, section 21 of Act VIII of 1869 (B. C.), and section 20 of Act X of 1859.

Babu Sib Chandra Palit, for the Respondents. The provision for interest is in excess of that which can be permitted under the law, inasmuch as it is for interest which exceeds $12\frac{1}{2}$ per cent. per annum. Interest could not run from the date when each instalment fell due, but from the expiration of that quarter of the agricultural year in which the instalment fell due. Section 67 of the Bengal Tenancy Act is clear. Section 178

(1) (1894) I. L. R. 23 Calo. 214.

(2) (1906) 3 O. L. J. 891; I. L. R. 33 Calo. 683.

controls both the rate of interest and the time from which the interest is to run. The Privy Council case of *Hemanta Kumari Debi v. Jagadindra Nath Roy* (r) does not support the plaintiff, inasmuch as the contract in that case was made before the passing of the Bengal Tenancy Act. The interest Act (XXXII of 1839) has no application to the present case, which is governed by the Bengal Tenancy Act.

Babu Bipin Behary Ghose, in reply.

The following judgments were delivered :

Jenkins O. J.—The only question that arises on this appeal is as to the time from which interest should run on arrears of rent. The contract between the parties is one after the passing of the Bengal Tenancy Act and one to which the provisions of that Act applies. By that contract provision is made for payment of the rent in monthly *kists* or instalments and also for payment of interest on each, from the time when it falls due.

It is contended on behalf of the landlord that literal effect should be given to this provision for interest.

On behalf of the tenant it is contended that interest cannot run from the date when each instalment fell due but from the expiration of that quarter of the agricultural year in which the instalment fell due. The reasons urged by the tenant for the adoption of this view, notwithstanding the express provision of the contract, are these : It is said in the first place that the provision for interest is in excess of that which can be permitted, inasmuch as it is for interest which exceeds $12\frac{1}{2}$ per cent per annum. It is conceded that this is a sound objection, but the landlord says that he is entitled to recover interest at the rate of $12\frac{1}{2}$ per cent. But if that be so, it cannot be by virtue of the contract, because there is no contract to that effect. The tenant goes further and says that it would be opposed to the distinct enactments of the Bengal Tenancy Act to hold that there is any contractual relationship between the landlord and tenant that would entitle him to receive 12 per cent per annum from the date when each *kist* fell due. It may be conceded that the landlord was entitled to impose on the tenant an obligation—to pay the monthly *kists* for that is in accord with the provisions of section 53 of the Bengal Tenancy Act, whereby it is provided that "subject to agreement or established usage, a money-rent payable by a tenant shall be paid in four equal instalments falling due on the last day of each quarter at the agricultural year."

Orin
1913.
Manohar
19.
Parash.

April, 23.

CIVIL

1918.

Manohar

v.

Parash.

Jenkins, C. J.

The words indicate that there may be an agreement in modification of the provision for four equal instalments and there is no reason to hold that there cannot be monthly instalments. But that carries the landlord but a short way on his road towards his claim. Section 67 of the Bengal Tenancy Act is one of a group of sections, being those numbered 65 to 68 inclusive, which deal with arrears of rent. By section 67 it is provided that "an arrear of rent shall bear simple interest at the rate of twelve and a half per centum per annum from the expiration of of that quarter of the agricultural year in which the instalment falls due to the institution of the suit, whichever date is earlier." That section as it now stands is a result of the amendment by the Bengal Tenancy amendment Act, 1907, and the case has been argued before us as though the amendment made no difference for the purpose of the question now under discussion. The answer that the landlord would make to the contention that section 67 must govern the relationship of landlord and tenant, is that these sections only relate to those cases where a contract between the parties provides for quarterly *kists*: and, in support of that, reference is made to the decision of the Privy Council in *Hemanta Kumari Debi v. Jagadindra Nath Roy Bahadur* (1). Especial reliance is placed on a passage at page 221 where Lord Macnaghten in delivering the judgment of the Privy Council says, "A subordinate question arose in Appeals Nos. 20 and 21 of 1890 with regard to the interest on the rent in arrear. It appears that there are some arrears which have become due since the Bengal Tenancy Act, 1885. The subordinate Court held that interest was to be calculated monthly on the arrears; but the High Court held that under the provisions of that Act, as regards arrears which became due after the Act came into force, the interest should be calculated quarterly. It appears to their Lordships that the High Court were wrong, and that the provision in section 67 of the Act, on which they relied, only applies to cases where the rent is payable quarterly. Here it is not disputed that the rent is payable monthly, and on rent in arrear it appears to their Lordships that interest ought to be calculated monthly." The learned Judges of the High Court in disposing of this matter had said this: "Now, with regard to the arrears which fell due since the present Act came into force, they stand on a different footing. We do not find that the plaintiff claimed interest on the footing of any contract, and therefore

(1) (1894) I. L. R. 22 Cal. 314.

the only claim that he has for interest is based upon the terms of the Bengal Tenancy Act. By section 67 of that Act, an arrear of rent shall bear simple interest at the rate of 12 per cent from the expiration of that quarter of the agricultural year in which the instalment falls due, to the institution of the suit. So, under the present law he is not entitled to interest from the date of the instalment, but from the end of the quarter in which it fell due. We, therefore, give him 12 per cent from the end of the quarter on which the instalment fell due, to the institution of the suit." In the grounds of appeal to the Privy Council it was urged that 'the Court had erred in not allowing interest on the monthly instalments of the rents which had fallen due after the Tenancy Act came into force: that the appellant having proved by evidence that from a long time past the defendant had been paying rent in monthly *kists* and interest at the rate of 12 percent, in the case of breach of any instalment, the appellant was entitled to interest at that rate on each monthly instalment irrespective of whether the rents fell due before or after the Tenancy Act came into force; that the evidence adduced in the case established a contract to pay interest on the monthly instalment before the passing of the Tenancy Act, and the Court was in error in holding that the appellant had not claimed interest on the footing of any contract, and the only claim she had for interest was based upon the terms of the Bengal Tenancy Act; that the appellant's claim for interest on the monthly instalments, whether based on contract or usage, was not affected by section 67 of the Bengal Tenancy Act.' Prior to the Bengal Tenancy Act interest on arrears of rent in respect of agricultural tenancy was regulated by section 21 of Act VIII of 1869,—which practically reproduces section 21 of Act X of 1859—whereby it was provided that "any instalment of rent which is not paid on or before the day when the same is payable according to the *pottah* or engagement, or if there be no written specification of the time of payment, at or before the time when such instalment is payable according to established usage, shall be held to be an arrear of rent under this Act, and, unless otherwise provided by written agreement, shall be liable to interest at twelve per centum per annum."

The only other provision for payment of interest on rent apart from contract to that effect was to be found in Act XXXII of 1839, which corresponds with the English Act 3 & 4 William IV Chapter XLII section 23. The judgment of the Privy

CIVIL

1918.

Manohor

v.

Parosh.

Jenkins, C. J.

CIVIL.

1918.

Manohar

v.

Parosh.

Jenkins, C. J.

Council must be read in the light of these facts. That judgment did not accept the view of the High Court that interest was payable under section 67 but under some other obligation ;—whether it was the Act of 1839 or the contract or usage does not appear, and it matters not, for their Lordships were satisfied that interest was payable, and I am not sure that there was any appeal by the tenant from the decision of the High Court that interest was payable. That then is how the matter stood. Their Lordships were dealing with a contract before the passing of the Act, and what we have to consider is whether that decision can in any way be taken as affecting a contract of tenancy made after the Act. The last thing that we would wish to do would be in any way to escape from the just result of the decision of the Privy Council, or to place upon any decision a limited construction of which it was not fairly capable. But it seems to me that we have in this case a condition of things which differentiates the present case from that before their Lordships, in an essential matter. In saying this I have in mind the fact, I have already stated, that the contract here was after the passing of the Act, which brings into play the provision in section 178 sub-section (3), clause (4) which says that "nothing in any contract made between a landlord and a tenant after the passing of this Act shall affect the provisions of section 67 relating to interest payable on arrears of rent." It is conceded in this case that so far as the rate of rent in excess of twelve per cent was charged, it was contrary to the provisions of the Bengal Tenancy Act. Therefore, as it seems to me, we have this position that there is no valid contract for the payment of interest on *kists*, the only provision in that direction being one which is admittedly illegal. How then is this interest payable? I have indicated the provisions of the law that permit a Court to charge interest. The Acts of 1869 and 1859 have passed away. We still have the Interest Act and the Bengal Tenancy Act. The Interest Act has no application here, so that we are reduced to this that there is no provision statutory or contractual which imposes upon the tenant a liability to pay interest, unless we can bring into play the operation of section 67. That has been done by the lower appellate Court. There has been no appeal from this by the tenant and the landlord is thus entitled to the interest secured to him by section 67 ; beyond that he cannot go.

For these reasons we confirm the decree. There would be no order for costs of defendant No. 1 as he has not appeared.

Defendant No. 2 will have his costs for he has been compelled to appear though he has no direct interest in the subject-matter of the appeal.

Roy J.—I agree.

A. N. R. C.

Appeal dismissed.

Before Mr. Justice Mookerjee and Mr. Justice Richardson.

HANUMAN DAS AND OTHERS

v.

GURSAHAY SINGH AND OTHERS.*

Decree, suit for—Transfer by unauthorized person who subsequently acquired interest in property transferred—Subsequent transfer—Subsequent transferee not a bona fide purchaser for value without notice—Prior mortgage, suit by—Decree against transferor of subsequent transferee—Suit dismissed against subsequent transferee—Decree, effect of—Transfer of Property Act (IV of 1882), Sec. 43—Evidence Act (I of 1872), Sec. 115—Issue sent down—Whole appeal, if can be heard.

When an issue had been sent down, the appeal pending in the High Court, after the finding had been received the whole appeal was open for consideration.

A mortgage was executed on behalf of A by her husband N in favour of B in 1877. The property passed after the death of A to N and other heirs. N then in 1886 executed a mortgage of his share, inherited from A, to O. O purchased, in execution of his mortgage decree, the property mortgaged to him and obtained possession in 1892. O was found not to be a bona fide purchaser, for value without notice, of the share purchased by him. In 1891, B brought a suit on his mortgage against the mortgagor's heirs and against O, as puisne mortgagee. In that suit O's defence was that his property was not liable as being outside the share of the mortgage in suit, and that of the representatives of the mortgagor, that it was invalid as executed by N who had no authority to execute. The suit was dismissed as against O, but was decreed against N on the ground that though the mortgage in its inception was inoperative as executed by an unauthorized person, yet it had subsequently become operative as against N in respect of the share which he had obtained by inheritance from A. This decree was executed by B's representatives and the property in suit was purchased by them. In a suit for recovery of possession of property by B's representatives against O's representatives :

Held, that the plaintiffs were not entitled to a decree.

Appeal by Defendants Nos. 1 to 4.

Suit for recovery of possession.

The material facts and arguments are sufficiently set forth in the judgment of Mookerjee J.

* Appeal from Appellate Decree No. 1846 of 1906, against the decree of L. N. Palit, Esq., District Judge of Gaya, dated the 23rd June, 1906, affirming that of Babu Annada Prasad Bagchi, Subordinate Judge of Gaya, dated the 25th August, 1903.

Civil

1918.

Manohar

vs.

Parash.

Jenkins, C. J.

CIVIL

1909.

April, 14.

CIVIL.

1908.

Hanuman

v.
Gursahay.

This appeal first came to be heard by Mitra and Bell JJ. on June 25th and 30th, 1908.

Babus Umakali Mukherjee and *Makhan Lal* for the Appellant.

Mouhvi Mahomed Yusoof and *Babu Hari Bhusan Mookerjee* for the Respondents.

Their Lordships sent down an issue for trial by the following judgment which was delivered by

Mitra J.—The facts of this case are somewhat complicated as the subject matter in dispute has been the subject of litigation for a long series of years. The 10 dams as to which the plaintiff sued belonged at one time to Musammat Amir Bibi. She mortgaged a half of her share *i.e.*, 2 annas to the father of the plaintiffs and later on she mortgaged the other 2 annas share to Adit Singh. We have nothing to do with the second mortgage.

On Amir Bibi's death an one anna share out of her 4 annas descended to Nasar Ali as one of her heirs. Nasar Ali mortgaged a half of this one anna *i.e.*, 10 dams to Kali Pershad whose heirs are some of the defendants in this case and the appellants before us. A suit was then instituted by the plaintiffs on their mortgage. They asked for the sale of the 2 annas share hypothecated to them by Amir Bibi. It was found that Amir Bibi had not executed the mortgage and that Nasar Ali had done so in her name without authority. The suit was accordingly dismissed by both the first and the lower appellate Courts.

The parties to the suit were, amongst others, the present appellants. They were impleaded in the suit as puisne mortgagees with respect to the 10 dams share. They pleaded in their defence that the 10 dams which had been mortgaged to their father and which they were in possession of on a sale under a decree on the mortgage was not included within the 2 annas share which had been mortgaged to the father of the plaintiffs. During the course of the suit, Nasar Ali and his eldest son, who were also parties to the suit, put in a petition admitting the plaintiff's claim. But the present appellants (defendants) contested the suit as well as some of the other defendants with the result that the Court came to a finding that Amir Bibi had not executed the deed of mortgage. This finding made it unnecessary to decide the question raised by these defendants in their written statement, *viz.*, whether the 10 dams share was included within the mortgage to the father

1908.

June, 30.

of the plaintiffs. That issue was left undecided by the Subordinate Judge though a distinct issue had been framed by him.

After the decision in the lower appellate Court, an appeal was preferred by the plaintiffs to this Court. This Court came to the conclusion on the 27th April 1897 that a part of the share mortgaged by Nasar Ali in the name of his wife Amir Bibi could be followed by the mortgagees, inasmuch as Nasar Ali had inherited at least a share of Amir Bibi's property. The learned Judges applied to the case section 115 of the Evidence Act and section 43 of the Transfer of Property Act.

There can be no doubt that if the contesting defendants, the present appellants were not *bonafide* purchasers for value without notice, the share obtained by them, namely, 10 dams could be sold in execution of the decree on the mortgage to the plaintiff's father. This Court held that there could be a sale so far as Nasar Ali's interest was concerned; but so far as the present appellants were concerned the Court used the following words. "The appellants have admittedly no right of appeal as against the respondents who have appeared." The present appellants were then the respondents and it appears that in all the three Courts the suit as against them was dismissed with costs.

The present suit was instituted by the plaintiffs for recovery of the said 10 dams share after the sale under the mortgage.

Three points have been raised before us. *First*, whether the previous suit having been dismissed as against the present appellants, they were bound by the order for sale and whether the plaintiffs could recover possession of this share or whether either party could redeem the interest from the other. *Secondly*, whether the present appellants are *bonafide* purchasers for value without notice of the mortgage in favour of the plaintiffs. *Thirdly*, whether the disclaimer in their written statement in the previous suit that the 10 dams purchased by them under their mortgage was not covered by the mortgage in favour of the plaintiffs, operated as a bar to the present suit.

We are of opinion that as regards the first contention, the decision should be in favour of the defendants, appellants. The dismissal of the suit did not preclude an adjudication of the question whether this share of 10 dams was recoverable by the plaintiffs as there was no final adjudication on the question raised by the defendants.

CEVIN.)

1909.

Hannumah

Gurubhay

Mitra, J.

CIVIL
1900
Hanuman
v.
Gurmahay.
Mitra, J.

As regards the third point, the issue raised by the written statement of these appellants was not tried. It does not appear from the judgment of this Court that the suit was dismissed as against them on the ground that they had disclaimed any interest. All that the learned Judges said is that "the appellants admittedly have no right of appeal as against the respondents ;", what the nature of the admission was is not quite clear. How the appellants had no right to appeal is not also stated in the judgment. We cannot apply the rule laid down in *Nilakant Banerji v. Suresh Chandra Mullick* (1) to the facts of the present case. In that case, while the suit was pending in the Original Side of this Court, the father of the respondents was discharged from the suit on his pleading a paramount title. The Judicial Committee of the Privy Council was of opinion that because the father of the respondents had disclaimed any interest in the mortgage suit and did not claim a right to redeem, they were precluded from setting up a right to redeem.

As regards the second point, however, there is no finding of the lower appellate Court. Section 43 of the Transfer of Property Act saves the rights of *bonafide* purchasers for value without notice. Before a subsequent purchaser might be held to be bound by the principle of equity which underlies that section, it is necessary to find whether the purchaser was a *bonafide* purchaser for value without notice. This question was not distinctly raised in either of the lower Courts. Having regard to the decision of the Judicial Committee in the case of *Mahomed Musaffer Hossein v. Kishori Mohun Roy* (2), we think we should allow the plea to be raised and direct a remand for a decision on this point, the lower appellate Court being at liberty to take such evidence on this point as either party may adduce.

We, however, keep the case on the file of this Court and direct the lower appellate Court to send its finding within two months from this date.

As regards costs of this hearing, we shall consider the matter when we next hear the appeal.

[The District Judge returned his finding to the effect that Kali Prasad was not a *bona fide* purchaser, for value without notice, of the 10 dams of property which the plaintiff sought to recover from the defendants, the sons of Kali Prasad. The appeal was set down for hearing before Mookerjee and

(1) (1885) I. L. R. 12 Calc. 414.

(2) (1895) I. L. R. 22 Calc. 909.

Richardson JJ. under orders of the Chief Justice as Mitra and Bell JJ. had ceased to be members of the Court.]

Babus Umakali Mukherjee and *Kulwant Sahay* for the Appellant.

Maulavi Muhammad Yusoof and *Babu Haribhushan Mookerjee* for the Respondent.

Maulavi Muhammad Yusoof, for the respondent, contended that in view of the finding of the District Judge the appeal should be dismissed.

Babu Umakali Mukherjee, for the appellant, contended that the whole appeal was open for discussion, and stated that he was prepared to satisfy the Court that notwithstanding the finding of the District Judge on the issue sent down by Mitra and Bell JJ., the appellant was entitled to succeed on the admitted facts and on the law applicable thereto.

[MOOKERJEE, J.—When an issue has been sent down, the appeal still pending in this Court, after the finding has been received, the whole appeal is open for consideration. This was laid down by Maclean C. J. in 1905 in the case of *Hiatusnessa v. Kailas Chandra* (1) which has not yet been reported].

The appeal was then argued on the merits on both sides. The nature of these arguments will appear sufficiently from the Judgment of the Court which was delivered by

Mookerjee J.—This is an appeal on behalf of the first four defendants in an action for recovery of possession of property which belonged at one time to Amir Bibi. The matter in controversy in this appeal is a ten gundas share in that property. The plaintiffs respondents claim to have derived title on the basis of a mortgage which was executed by Amir Bibi on the 25th August, 1877. This mortgage covered a two annas share in the property and was executed on her behalf by her husband Nasar Ali Khan. The defendants appellants claim to have derived title under a mortgage executed on the 19th May 1886 by Nasar Ali himself after the death of his wife. This mortgage covered a ten dams share of the property in dispute. In 1890 the mortgagee of 1886, by name Kali Prasad, sued to enforce his security. He got a decree, executed it, purchased the mortgaged property, and obtained possession thereof about November 1892. Meanwhile in 1891 the mortgagee of 1877 had brought a suit to enforce his security. To this action Kali Prasad was made a party as puisne-encumbrancer. He appears to have defended the suit on the

CIVIL.

1908.

Hanuman

Gurnahay.

Mitra, J.

April, 14.

(1) (1906) (since reported) in 16 O. L. J. 239.

CIVIL

1900.

Hanuman

P.

Gurmahay.

Mopharjee, J.

ground that the property covered by the mortgage of 1886 was outside the share covered by the mortgage of 1877. The representatives of the mortgagor, on the other hand, resisted the claim of the mortgagee on the ground that Nasar Ali had no authority to execute the mortgage on behalf of his wife. The Court of first instance as well as the court of first appeal dismissed the suit. The matter then came in second appeal to this Court, and one of the principal points involved in the present appeal is as to the precise effect of the decree of the High Court in that litigation. It appears to have been contended before this Court on behalf of the then plaintiffs that although the mortgage might in its inception have been inoperative because it had been executed by the husband of Amir Bibi without authority from her, yet it had subsequently become operative as against Nasar Ali in respect of the share which he had obtained by inheritance upon the death of his wife. This contention prevailed, and this Court held that upon the doctrine of estoppel as embodied in section 115 of the Evidence Act, the then appellants, the mortgagees of 1877, were entitled to get a decree against Nasar Ali Khan. The judgment then proceeded to state that the appellants had admittedly no right of appeal as against the respondent who appeared, that is, as against the mortgagee of 1886. The decree which was drawn up was to the effect that the suit was decreed as against Nasar Ali and dismissed as against Kali Prasad.

The point in controversy between the parties now is as to the precise effect of this decree. It has been contended on behalf of the representatives of the mortgagees of 1877, who have subsequently in execution of the decree of this Court purchased the disputed property, that the effect of this decree was to leave untouched the question of the validity of the claim of the mortgagees of 1886, and that, in substance, the suit was dismissed as against the mortgagee of 1886 because he had pleaded that he had no interest in the property covered by the mortgage of 1877. On behalf of the representatives of the mortgagee of 1886, it has been argued, on the other hand, that the suit was dismissed as against him, because the plaintiffs found themselves unable to prove their claim as against him, as he was actually represented at the hearing of the appeal in this court. The question of the precise effect of the decree of this Court is not free from difficulty, as the judgment is somewhat ambiguous. But whatever interpretation may be put upon it, it is in our opinion clear that the plaintiffs in the present litigation are not entitled to succeed against the

defendants appellants. Let us assume the first possible alternative, that the suit was dismissed as against the mortgagee of 1886, because the plaintiff accepted his contention that he had no interest in the property covered by the mortgage of 1877. If the plaintiff accepted this contention and got his suit dismissed on that footing as against the mortgagee of 1886, he cannot now turn round and contend that the mortgagee of 1886 had an interest in the property covered by the mortgage of 1877. He cannot be allowed to take up two inconsistent positions and practically nullify the decree obtained at his own instance in 1897.

Assume on the other hand the second and only other possible alternative, namely, that the mortgagee of 1886 had an actual interest in the property covered by the mortgage of 1877 and that in spite of this circumstance the mortgagee of 1877 got the previous suit dismissed as against him. It is manifest that he is equally without any remedy now. It was open to him to prove in the previous litigation that the title to the property against which he claimed to proceed on the basis of estoppel, had at the time of the decree of this Court vested not only in Nasar Ali but also in the mortgagee of 1886. If he could establish this, he would have been entitled to a decree against Nasar Ali as well as Kali Prasad. He, however, got his appeal dismissed against Kali Prasad; by this dismissal, his remedy as against him was finally lost. Upon either view, therefore, the plaintiffs are not entitled to proceed against Kali Prasad now on the ground that his title based on the mortgage of 1886 is subordinate to the title of the plaintiffs based on the mortgage of 1877.

The result is that this appeal must be allowed and the suit dismissed with costs in all the Courts.

A. T. M.

Appeal allowed.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.*

KESEAB PANDA, alias, SIVA PANDA

v.

BHOBANI PANDA AND OTHERS.*

*Record of rights—Dispute as to entry—Bengal Tenancy Act (VIII of 1886),
Sec. 106—Compromise decrees—Preamble and enacting part.*

Where a settlement of land revenue is not being or is not about to be made,

* Letters Patent Appeal No. 49 of 1913 under section 15 of the Letters Patent, from the decision of Mr. Justice Coxa, dated the 30th January, 1913, in Appeal from Appellate Decree No. 154 of 1910, against the decree of L. C. Adami Esq., District Judge of Outback, dated the 19th August, 1909, affirming that of Babu B. K. Das Adhikari, Revenue Officer, dated the 31st October, 1908.

CIVIL

1909.

Hanuman

v.

Gurnahay.

Mookerjee, J.

CIVIL

1918.

July, 8, 14.

CIVIL.

1912.

Keshab Panda
v.
Bhobani Panda.

a dispute as to an entry in the record of rights, though arising under Part I of Chap. X of the Bengal Tenancy Act, is a matter that can be decided under section 106.

A preamble of an Act does not govern clear expressions in the enacting part.

A compromise is a binding agreement between the parties, and none the less binding because it is followed by a decree.

Wentworth v. Bullen (1) followed.

Appeal by the Defendant.

Suit for a declaration of right to a parcel of land bearing No. 166 and for transfer of the same to Towzi No. 1693. The parties were inhabitants of Balasore. In 1897 there was a Provincial Settlement. The land in suit was obtained by the defendant in a suit under section 106 of the Bengal Tenancy Act in 1898. The plaintiff then brought a suit for declaration of title and for a declaration that the entry of the defendant's name in the record of rights was ineffectual. That suit was compromised in or about 1899 and the defendant gave up the land. In 1908 there was a Revisional Settlement and the defendant's name was entered. This suit was then brought by the plaintiff before the Revenue Officer under section 106 of the Bengal Tenancy Act. The defence was that the suit was barred by *res judicata* and the compromise decree was not binding as it was not passed by a competent Court. The Courts below decreed the suit. The defendant appealed to the High Court. The appeal came on for hearing before Mr. Justice Cox on the 30th January, 1912.

Babu Provas Chander Mitra for the Appellant.

Babu Charu Chandra Biswas (for *Babu Ashutosh Mukerji*) for the Respondent.

The following judgment was delivered by

Coxe J.—The land in suit, in the present case, was obtained by the defendant in a suit under section 106 of the Bengal Tenancy Act, though it may be that the question of possession only was decided. The plaintiff then brought a suit for declaration of title and for a declaration that the entry of the defendant's name in the record of rights was ineffectual. That suit was compromised and the defendant gave up the land. There has now been another record of rights and this appeal arises out of another suit under section 106 to correct any entry recording the land as the property of the defendant. The suit has been decreed and the defendant appeals.

(1) (1899) 9 B. and C. 840.

1912.

January, 30.

The only point taken in appeal is that the suit which ended in the compromise decree was without jurisdiction. The first decision under section 106 had the force of a decree and a suit could not be brought to set it aside except on the ground of fraud. The suit, however, was not a suit to set aside the decree but one to obtain a declaration of title. No doubt the defendant might have pleaded the former decision under section 106 and this decision, if pleaded, might possibly have been a complete answer to the suit and insured its dismissal under the rule of *res judicata*. But if the defendant preferred not to adopt this course, but consented that judgment should be given for the plaintiff, I do not think he can now say that the Court had no jurisdiction to deal with the case and pass the decree.

The appeal is dismissed with costs.

Against this decision the defendant preferred an appeal under section 15 of the Letters Patent.

Babu Probodh Chunder Dutt (for *Babu Mohini Mohon Chatterjee*) for the Appellant.

Babus Ashutosh Mookerji and *Charu Chandra Biswas* for the Respondent.

The judgment of the Court was delivered by

Jenkins O. J.—This appeal has been admirably argued before us by the two learned juniors, *Babu Probodh Chandra Datta* on behalf of the appellant and *Babu Charu Chandra Biswas* on behalf of the respondent, and their argument leaves nothing further to be considered; and so it is that notwithstanding its complications, we feel that we can dispose of the case without reserving our judgment.

The appeal is from a judgment of Mr. Justice Coxe who confirmed the decree of the lower appellate Court. By the suit the plaintiffs, respondents, sought a declaration of right to a parcel of land bearing No. 166 and for transfer of the same to Fouzi No. 1693. On the merits, this suit must be decided on a compromise which terminated the previous litigation, and we desire to base our judgment upon the ground that the compromise was a binding agreement between the parties, and none the less binding because it was followed by a decree. This is a principle that has the authority of the judgment in *Wentworth v. Bullen* (1) where it was said that "the contract of the parties is not the less a contract, and subject to the incidents of a

CIVIL

1918.

Keshab Panda

Bhubani Panda.

Coxe, J.

July, 14.

CIVIL.

1913.

Keshab Panda,

v.
Bhubani Panda.

Jenktas, C. J.

contract, because there is superadded the command of the Judge." On that ground, as we indicated on the last occasion, our decision must be against the appellant on the merits.

It was, however, ingeniously suggested to us that as this suit purports to be under section 106 of the Bengal Tenancy Act, it really is incompetent, inasmuch as those conditions do not exist which are requisite in order that a suit under that section may be brought. As it was not clear on the materials upon the record whether a settlement of land revenue was being or about to be made in connection with the Record of Rights which has given rise to this suit, we allowed the case to stand over in order that definite information might be obtained on that point. We have been able to ascertain that there has been an order by the Local Government with the previous sanction of the Governor-General in Council in exercise of the powers conferred by section 101, sub-section (1) of the Bengal Tenancy Act, that a Record of Rights should be prepared in respect of lands which included those now in suit. We also have reason to suppose that there was no settlement of land revenue being made or about to be made. On that basis we will dispose of the suit.

For the plaintiff respondent who has to establish the competency of this suit, it is contended that section 106 does apply in the circumstances of this case. It is said that there has been a Record of Rights, that disputes have arisen, and that a suit under section 106 is necessary for the purpose of a decision of those disputes, seeing that this is a case where a settlement of land revenue was not being or about to be made.

By way of answer to that, it is objected that section 106 is contained in Part III of Chapter X and that the fair meaning of the provisions contained in that part is that its provisions cannot be called into play unless there has been an application either by the landlord or the tenant for a settlement of rent. It is said that there was no such application and therefore the provisions of Part III do not apply.

It must, I think, be conceded that the Bengal Tenancy Act has lost in clearness as it has increased in bulk and that the more recent growths have not tended to preserve the original unity of the Act. The Act as originally drawn was clear in its scheme and its provisions, but unfortunately it was found that the purpose of the Legislature had failed in certain respects, and so from time to time there have been what are called amendments of

the Act: and, it is by reason of those amendments that we are in the difficulty which confronts us today. Now Chapter X, as it at present stands, substantially reflects that chapter as enacted by Bengal Act III of 1898. I will therefore turn to that Act in the first instance to see what it provides. The heading of the chapter is "Record of Rights and Settlement of Rents." Part I is headed Record of Rights. Part II commences with section 104 and its original heading was as follows, "Settlement of Rents, Preparation of Settlement Rent Roll, and Decision of Disputes in cases where a Settlement of Land-revenue is being or is about to be made." Part III which commences with section 105 is headed "Settlement of Rents and Decision of Disputes in cases where a Settlement of Land-revenue is not being or is not about to be made." Part IV which begins with section 110 is headed, "Supplemental Provisions." It has been pointed out that its preamble treats the Bengal Tenancy Act as one to amend and consolidate enactments relating to the law of landlord and tenant, and so, it is said that it is not in conformity with that scheme to utilise section 106 in a case where the relation of landlord and tenant is not in question.

While I recognise the force of this argument, still I am of opinion that section 106 must be taken to apply even where there may not be a settlement of rents, provided a settlement of land-revenue is not being or is not about to be made. My reason for so thinking is, *first*, that we have as the heading of that part not only the phrase "settlement of rents" but also the expression "decision of disputes." I do not forget that the heading of Part II as originally framed also contained the phrase "decision of disputes", but this has been amended by Bengal Act I of 1907, section 23, whereby the expression "disposal of objections" had been substituted for "decision of disputes." This alteration was before the events to which the present litigation relates. This amendment of the Act coupled with the phraseology of chapter X leads me to the view that the Legislature used each of the expressions "decision of disputes" and "disposal of objections" as a term of art, each referring to a different stage of the proceedings under chapter X. The importance of this expression "decision of disputes" in the heading of Part III is that it indicates an intention on the part of the Legislature that where a settlement of land-revenue was not being or about to be made, a dispute as to an entry in the Record of Rights, though there was no "settlement of rents",

CIVIL.

1918.

Keshab Panda

Shobani Panda

Jenkins, C. J.

CIVIL;

1918.

Hoshab, Pandey

Bhobani Pandey,

Jadhav, C. J.

should be decided by the machinery provided in section 106. That section, as it originally stood in Act III of 1898, is, I think, clearer in its support of this view than the section as subsequently amended. As it originally stood, it was described in the marginal note as "decision of disputes by Revenue Officers" and it was in these terms. "If in any case under this part a dispute arises at any time within two months from the date of the certificate of the final publication of the Record of Rights under section 103 A, sub-section (2), regarding any entry which the Revenue Officer has made in, or any omission made from the record whether such dispute be between landlord and tenant, or between landlords of the same or of neighbouring estates, or between tenant and tenant, or as to whether the relationship of landlord and tenant exists, or as to whether land held rent-free is properly so held, or as to any other matter—a suit may be instituted before the Revenue Officer, by presenting a plaint on stamped paper, for the decision of the dispute; and the Revenue Officer shall then hear and decide the dispute." The section has since been amended, and matters have been introduced into it which perhaps have not tended to make the section clearer for this particular purpose. But I do not think that the amendment of the section, and, in so saying, I particularly bear in mind the proviso on which Babu Probodh Chander Dutt relied, was aimed at altering the general scheme of Part III.

The matter is, I think, made even clearer in favour of the view that I have indicated, by the introduction of section 105 A. It has to be recognised that much that is now contained in Part III of Chapter X is outside the just limits of the preamble to the Act; still the preamble cannot govern clear expressions in the enacting part, and the conclusion to which I come, is that where a settlement of land-revenue is not being or is not about to be made, a dispute as to an entry in the Record of Rights, though arising under Part I Chapter X, is a matter that can be decided under section 106.

It is on the grounds which I have expressed, that we think the decision under appeal should not be disturbed, and we must, therefore, dismiss this appeal with costs. Again, I desire to recognise the valuable assistance which we have received from the Bar.

A. T. M.

Appeal dismissed.

*Before Sir Lawrence Jenkins, K. C. J. E., Chief Justice
and Sir Asutosh Mookerjee, Knight, Judge.*

PRAN KRISHNA SAHA

v.

MUKTA SUNDARI DASSYA AND OTHERS.*

Presumption—Rent, fixity of—Long payment of rent at uniform rate—Potts found false—Abandonment and surrender—Non-transferable occupancy holding, transfer of, effect of—Bengal Tenancy Act (VIII of 1885), Secs. 85, 87—Sub-lease by a raiyat, invalid—Under-raiyat's position—Court if can accept part of written statement.

It is open to the Court, apart from the provisions of section 50 sub-section (2) of the Bengal Tenancy Act, to draw an inference as to a *jote* having been held at a fixed rent from the Permanent Settlement from the fact of long payment of rent at a uniform rate.

Per N. Chatterjee J.—Where the *potts* dated sometime before the Permanent Settlement filed by the tenant to prove fixity of rent, was found to be false :

Held, that the tenant was not precluded from asking the Court to draw an inference as to the fixity of rent, if he proved other facts which could give rise to such an inference.

Casperis v. Kader Nuth (1) followed.

The position of a landlord in a case of abandonment is stronger than in the case of a surrender by a raiyat. In the case of an abandonment, the landlord does not acquire any title through the raiyat as in the case of a purchase.

In the case of a non-transferable occupancy holding, where the raiyat sells the holding and quits possession of the lands, the lands become part of the *khass* lands of the landlord, and the holding does not continue to exist in such a case apart from the right of occupancy itself.

Section 87 of the Bengal Tenancy Act is not exhaustive.

Where a sub-lease by a raiyat is not binding on the landlord and the holding does not subsist after abandonment, an under-raiyat does not become a raiyat.

A Court can accept a portion of the statement of the defendant and reject another portion.

Appeal by the Plaintiff.

Suit for ejectment.

The material facts and arguments appear from the judgment of Mr. Justice N. Chatterjee.

Babus Kishori Lal Sarkar and Haris Chandra Roy for the Appellants.

Babu Harendra Narayan Mitter for the Respondent.

C. A. V.

* Letters Patent Appeal No. 70 of 1911, under section 15 of the Letters Patent, against the decision of Mr. Justice N. Chatterjee, dated the 18th March, 1911, in Appeal from Appellate Decree No. 105 of 1909 against the decree of Babu Jogan Monon Sarkar, Additional Subordinate Judge of Pabna and Bayra, dated the 22nd September, 1908 affirming that of Babu Rajaul Kumar Ghose, Munsiff, 1st Court at Pabna, dated the 30th September, 1907.

(1) (1901) L. L. R. 21 Calo. 733; 5 C. W. N. 838.

CIVIL.

1918.

Pran Krishna
P.
Mukta Sundari.

1911.

January, 24.
March, 13.

The following judgment was delivered by

N. Chatterjee J.—This appeal arises out of a suit for ejectment. The plaintiff respondent who was the *putni* and *darpatni* talukdar of Taraf Satrani alleged that there was a non-transferable occupancy holding in Satrani standing in the name of one Krista Kishore Ghose consisting of the lands of schedule *ka* measuring 8 bighas and odd by recent measurement which was held by his grandson Dino Nath Ghosh, and that the lands of schedule *kha* measuring 11 bighas and odd by recent measurement were the *khas khamar* lands of the plaintiff of which he was in possession through his *burgadars* the defendants 13 and 16, that in a rent suit brought against Dino Nath the latter stated that the *jote* comprised the lands of both the schedules *ka* and *kha*, and was a *kaimi mourasi* one and had been sold by him to defendants, 1, 2 and 6 and that the purchasers were in possession thereof. The plaintiffs further alleged that as Dino Nath had ceased to pay rent and parted with his interest in the holding which was not transferable the purchasers acquired no right by their purchase, and as the defendants 13 to 16 had given up the lands of schedule *kha*, he was entitled to re-enter on the lands of both schedules *ka* and *kha*, but that he was obstructed in his taking possession thereof by defendants 1, 2 and 6 on the ground of their purchase and by defendants 3 to 5, and 7 to 12 on the ground that they were *dur-jotedars* under Dino Nath Ghosh. Plaintiff accordingly prayed for *khas* possession of the lands on declaration that the *jote* was a non-transferable occupancy holding and that the defendants 1, 2 and 6 had acquired no title by their alleged purchases and that the *korfa* settlements set up by defendants 3 to 5 and 7 to 12 were invalid as they were made without his consent.

The defence of the purchaser defendants 1 and 2 *inter alia* was that the lands of both the schedules *ka* and *kha* were included in the *jote*, that the suit was bad for misjoinder and that the *jote* was a transferable, *kaimi jote*. The defendants Nos. 3 to 5 and 10 to 12 in addition to the above pleas, pleaded that they were *kaimi dur-jotedars* and that the suit was not maintainable without a notice to quit. The Court of first instance decreed the suit and that decree has been confirmed on appeal.

Defendants Nos. 1 to 5 and 10 have appealed to this Court.

The first contention raised on behalf of the appellants relates to the question whether the *jote* is a tenure or a holding. It is urged that the *onus* is on the plaintiff to prove that the *jote* is a

holding and not a tenure. But the area being less than one hundred bighas there is no presumption that it is a tenure. It is true the *jote* has been sub-let for sometime, but since when does not appear and having regard to the fact that the purpose for which the *jote* was originally acquired is not known and the other circumstances mentioned by the learned Subordinate Judge, I am unable to hold that he was wrong in coming to the conclusion that it is a holding. The *second* point urged is that upon the facts found in the case *vis.*, that the *jote* was held at a fixed rent for at least 55 years the Courts below ought to have held that a presumption arises apart from the provisions of section 50 clause (2) of the Bengal Tenancy Act that the *jote* was held at a fixed rent. The Courts below have held relying upon the authority of the case of *Sarat Chandra Ghose v. Shyam Chand Singha* (1), that the presumption referred to in section 50 (2) of the Bengal Tenancy Act does not arise in the present suit which is not a suit under the Bengal Tenancy Act. I think the appellants' contention ought to prevail. It is true the provisions of section 50 clause (2) of the Bengal Tenancy Act apply only to suits or proceedings under the Bengal Tenancy Act between the landlords and tenants as such as held in the case cited above and in the case of *Rasamoy v. Srinath* (2), but it does not follow that it is not open to the Court to draw an inference as to the *jote* having been held at a fixed rent from the Permanent Settlement, from the fact of long payment of rent at an uniform rate. There is nothing to prevent the Court from drawing an inference of fact from the facts proved in the case that the original contract was to hold at a fixed rent. The question was raised in several cases, and I need refer only to the latest case on the point—the unreported judgment in *Nityananda v. Nanda Kumar* (3), where the learned Judges Mookerjee and Carnduff JJ., observed as follows:—"The object of the Legislature in providing for the presumption as to fixity of rent mentioned in section 50 of the Bengal Tenancy Act was to provide in suits or proceedings under the Act, that is, in suits or proceedings between landlords and tenants as such an easy method of determination of the rights of the parties. It does not follow however by any means that in cases to which the section has no application it is not open to the Court to draw any appropriate inference from the facts proved by the evidence on the record. In support of this view reference may be made to the cases of *Dinendra Narain Roy v. Tituram*

CIVIL:

1918.

Pran Krishna
v.
Mukta Sundari
N. Chatterjee, J.

(1) (1906) 10 O. W. N. 930. (2) (1902) 7 O. W. N. 182.
(3) (1910) 18 O. L. J. 415.

CIVIL

1913.

Pran Krishna

v.

Mukta Sundari,

N. Chatterjee, J.

Mukerjee (1), *Grant v. Mrs. Robinson* (2), *Nunda Lal Gossami v. Atarmoni Dassi* (3) and *Gulab Misser v. Kalanand Singh* (4).

It was however contended on behalf of the respondent that the defendants having set up a *potta* which has been found to be false, there is no room for any presumption, and *secondly*, that the defendants having relied upon the presumption laid down in section 50 of the Bengal Tenancy Act in the Courts below cannot now contend that such a presumption arises apart from the provisions of the Bengal Tenancy Act and, *thirdly*, that the defendants did not set up in the written statement that uniform payment of rent raised the presumption.

It is true the defendants set up a *potta*, dated some time before the Permanent Settlement, but it has been found to be false. Under the circumstances I do not think the defendants are precluded from asking the Court to draw an inference as to the fixity of rent if they have proved other facts which would give rise to such an inference. (*See Caspersse v. Kedar Nath Sarbadhikari* (5)).

In their written statement the defendants stated that Kristo Kishore Ghose held the *jote* at a fixed *jama* from long before the Permanent Settlement from the time of the former zamindar of Natore and that from time immemorial for upwards of 20 years the late Kristo Kishore Ghosh and his heirs paid rent at a fixed rate. They did not rely upon section 50 (2) of the Bengal Tenancy Act in their written statement and at the hearing relied upon authorities to show that the presumption arises apart from the provisions of that section. It is not necessary that defendants should state in their written statement that uniform payment of rent raised the presumption. I accordingly hold that the lower appellate Court below ought to have come to a finding as to whether any inference, could be drawn from the facts proved in the case apart from the provisions of section 50 of the Bengal Tenancy Act, that the *jote* was held at a fixed rate and was transferable.

The third contention raised on behalf of the appellant is with respect to the under-raiyats. It is contended that even if the purchaser defendants did not acquire any rights by the transfer, the rights of the under-rayats can not be affected.

(1) (1903) 1, L. B. 80 Calo. 801. (2) (1906) 11 O. W. N. 242.

(3) (1908) 12 O. W. N. 482; 1, L. B. 85 Calo. 768.

(4) (1910) 14 O. W. N. 834; 12 O. L. J. 107.

(5) (1911) 5 O. W. N. 858 (861).

Under section 85 of the Bengal Tenancy Act a sub-lease granted by a raiyat without the landlord's consent is valid only for a limited period as against the landlord but is valid as against the raiyat himself (see *Gopal Mondal v. Eshan Chunder Banerjee* (1).

It has been held that where the landlord purchases a holding at a sale in execution of a decree for arrears of rent, he is not bound to annul the under-raiyati as an incumbrance under section 167 of the Bengal Tenancy Act in order to enable him to obtain *khas* possession. See *Peary Mohun Mookerjee v. Badul Chandra Bagdi* (2). In that case it was held that the provision of section 22 of the Bengal Tenancy Act does not stand in the way of the landlord's recovering *khas* possession, because that section merely saves the rights of third persons which were valid as against the landlord. The question however whether an under-raiyat in such a case is entitled to a notice under section 49, Bengal Tenancy Act, was not raised in that case, the defendant having set up a permanent right.

In the case of a purchase by the landlord of the rights of a raiyat by a conveyance it has been held that the landlord cannot eject the under-raiyat without putting an end to the tenancy according to law. As the raiyat himself, if his interest subsisted, could not eject the under-raiyat without a notice under section 49 (b) of the Act, the landlord who steps into his shoes similarly cannot do so without putting an end to the tenancy. The landlord who acquires the rights of the occupancy holder under a private sale cannot claim any higher right than the occupancy holder himself had. See *Amirullah v. Nasir Mahomed* (3), heard by Geidt and Mookerjee, JJ., and the same case heard by Ghosh and Pargiter, JJ., (4) and *Lal Mahomed Sarkar v. Jagir Sheikh* (5).

Where, however, a raiyat surrenders his holding it has been held that the landlord can re-enter by ejecting the under-raiyat without a notice to *quit* if not protected by section 85 or section 86 clause (b) of the Bengal Tenancy Act see *Nilkanta Chaki v. Ghatoo Sheikh* (6) and *Badan Chandra Das v. Rajeswari Debbya* (7). Section 22 of the Bengal Tenancy Act provides that when the immediate landlord of an occupancy holding is a proprietor or permanent tenure-holder and the entire interests of the landlord and the raiyat in the holding became united in the

CIVIL.

1918.

Pran Krishna

Mukta Sundari,

N. Chatterjee J.

(1) (1901) I. L. R. 29 Calo. 148.

(4) (1905) I. L. R. 34 Calo. 104.

(2) (1900) I. L. R. 28 Calo. 206.

(5) (1909) 18 C. W. N. 918.

(8) (1904) I. L. R. 31 Calo. 932.

(6) (1907) 4 C. W. N. 667.

(7) (1906) 2 C. L. J. 570.

CIVIL

1918.

Pran Krishna
v.
Mukta Sundari,
N. Chatterjee J.

same person by transfer, succession or otherwise the occupancy right shall cease to exist but nothing in this sub-section shall prejudicially affect the rights of any third person. The word "otherwise" in the above section was construed as meaning 'in a similar way to transfer or succession' in the case cited above.

It seems to me that the position of a landlord in a case of abandonment is stronger than in the case of a surrender by a raiyat. In the case of an abandonment, the landlord does not acquire any title through the raiyat as in the case of purchase. In the case of a surrender, the raiyat gives up the land to the landlord. In the case of a non-transferable occupancy-holding where the raiyat sells the holding and quits possession of the lands, the lands become part of the *khas* lands of the landlord, and I think the holding does not continue to exist in such a case apart from the right of occupancy itself.

The provisions of section 87 of the Bengal Tenancy Act lend support to the above view. The provisions of that section show that the landlord can enter on the holding in the case of an abandonment even if there are sub-lessees, the only exception being made in favour of a sub-lease executed by a registered instrument the term of which is still unexpired and in such a case the landlord has to offer the holding to the sub-lessee only for the unexpired term of the lease. Under section 22 (1) the holding continues to subsist divested of the right of occupancy and if the word "otherwise" covers a case of abandonment, and the holding itself apart from the right of occupancy subsists in the case of an abandonment, all sub-leases which are valid against the raiyat himself would have been saved under section 87 of the Act instead of only a sub-lease of which the term had not expired and that only for the unexpired term. Section 87 of the Act (the provisions of which are not exhaustive) does not appear to be applicable to the case of an abandonment such as we have in the present case. The section however shows the position of an under-raiyat in the case of an abandonment.

There does not appear to be any sub-lease by a registered instrument in the present case which can stand good against the landlord having regard to the provisions of section 85 of the Bengal Tenancy Act.

In this connection I ought to notice another argument on behalf of the appellant. It is contended that on a raiyat abandoning the land, the under-raiyat gets a lift so to say and becomes a raiyat. If the sub-lease is not binding on the landlord and the holding does not subsist after abandonment, I do not

see how the under-raiyat becomes converted into a raiyat in such a case.

I hold therefore that the under-raiyats have no valid rights as against the plaintiff. They cannot resist the claim for *khas* possession if the purchaser defendants did not acquire any right under their purchases. The fourth contention raised on behalf of the appellant also relates to the *dur-jotedars*. It is urged that plaintiff received rents from the *dur-jotedars*, and even if the *durjotes* are not valid the landlord has recognized the *durjotes* by receiving rent from them. But the question does not appear to have been urged before the lower appellate Court, and having regard to the findings arrived at by the Court of the first instance at page 21 of the paper-book, I do not think the contention is a valid one.

The fifth point raised is that plaintiff having failed to prove that the lands of schedule *kha* were his *khas khamar* lands cannot fall back upon the defendant's written statement, and if he wishes to do so he must take the statements in the written statement as a whole. I do not think, however, that there is anything to prevent the Court from accepting a portion of the statement of the defendants and rejecting another portion. The defendants did not set up any rights to the lands of schedule *kha* other than those of a tenant.

The last ground taken is that the suit is bad for misjoinder of parties and causes of action. It is contended that as the lands of schedule *kha* were claimed as *khas khamar* and those of schedule *ka* as being formerly held by Dino Nath—the causes of action were different. The purchasers were different and the lands were purchased at different times and the sub-lessees held different plots. The question of misjoinder of parties appears not to have been pressed in the lower appellate Court. As regards misjoinder of causes of action the Courts below have found that the lands of both the schedules *ka* and *kha* are included in the *jote* of Kristo Kishore and the defendants were sued as trespassers in respect of both the plots.

Besides the defendants do not appear to have been prejudiced, and the defect if any is cured by the provisions of section 578 of Act XIV of 1882.

The case, however, will go back to the lower appellate Court for a re-hearing with reference to the second contention raised on behalf of the appellant, in accordance with the observations made in the judgment. Costs will abide the result.

CIVIL.

1918.

Pran Krishna

Mukta Sundari.

N. Chatterjee, J.

CIVIL.

1918.

Pran Krishna
v.
Mukta Sundari.

May, 28.

Against this decision, the plaintiff preferred an appeal under section 15 of the Letters Patent.

Babu Harendra Narayan Mitra for the Appellant.

Babus Kisori Lal Sarkar and *Haris Chandra Roy* for the Respondent.

The judgment of the Court was delivered by

Jenkins C. J.—It is urged in this case that Mr. Justice Nalini Ranjan Chatterjee has erred in directing a remand. The reason why he directed this remand is that as he read the judgment of the lower appellate Court it was considered by that Court that there was a legal obstacle in the way of its presuming from long uniform rent that the holding was one at fixed rates. Our perusal of the judgment of the lower appellate Court leads us to the same conclusion. We think the Judge of that Court regarded himself as legally bound not to apply any such presumption, whereas the true view is that he is entitled to consider in view of all the circumstances whether it was not a just inference that the holding was of the nature claimed by the respondent before us. For these reasons I think the learned Judge was right in remanding the case, and we must dismiss this appeal with costs.

A. T. M.

Appeal dismissed.

PRIVY COUNCIL.

PRESENT: *Lord Shaw, Lord Moulton, Sir John Edge
and Mr. Ameer Ali:*

BHAIYA JANKI PERSHAD SINGH

v.

BHAIYA DWARKA PERSHAD SINGH.

P. O.

1918.

April, 15, 18.
June, 10.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF OUDH.]

*Oudh Law—Joint family property—Partition—Oudh Estates Act (I of 1860),
Secs. 2, 3 and 8—Talukdar—Estate—Summary Settlement—Impartibility—
Talukdari tenure and acquisitions, succession in.*

An order sanctioning the summary settlement of Government revenue in respect of 9 villages in Oudh with one A, as *malguzar*, was passed on the 5th October 1859, but the *Aduliat* was not signed by him until the following 18th, and in the first regular settlement 6 more villages were decreed to him. A's name was entered in the first and second lists prepared under section 8 of the Oudh Estates Act:

Held, that the summary settlement was in fact made on the 5th October 1859, which was 'between' the two dates given in section 8 of the Act

and the right which A acquired by the order of that date, was not affected by the delay in signing the *kabuliat*, the execution of which on the following 18th related back to the former date.

Held, also, that A was a taluqdar and the said villages constituted an 'Estate' within the meaning of section 2 of the Act and were consequently impartible.

Held, further, that the question whether properties acquired by an Oudh 'taluqdar' became part of his '*taluqa*' for the purpose of his succession depended on his intention to incorporate the acquisitions with the '*taluqa*'. In the absence of such an intention, the ordinary rule of succession of the Hindu Law applied.

Srimati Rani Parbati Kumari Dobi v. Jagdis Chunder Dhabal (1) followed.

Two consolidated appeals from two decrees of the Court of the Judicial Commissioner of Oudh, dated September 8, 1909, varying a decree of the Court of the Subordinate Judge of Barabanki, dated September 15, 1908.

The suit giving rise to these appeals was instituted by the plaintiff for partition of certain villages enumerated in a list attached to the plaint. The first defendant was his elder brother and their mother, who was then alive, was joined as the second defendant.

The material facts were stated in the judgment of their Lordships.

Sir H. Erle Richards, K. C. and *K. Brown* for the Defendant. The order for summary settlement was made on October 5, 1859, on which date Autar Singh acquired the right to have the summary settlement of nine villages made with him. The execution of the *kabuliat* on the following 13th was a formal matter and the *kabuliat* when executed related back to the 5th. During the first regular settlement 6 more villages were decreed to him. These 15 villages thus acquired form an 'Estate' within the meaning of Act 1 of 1869: See sections 2 & 3. His name was entered in the first and second list prepared under section 8, and under section 10 the Court is bound to take judicial notice of the lists, which are conclusive evidence that Autar was a Taluqdar within the meaning of the Act. The 'Estate' consisting of the 15 villages is impartible and the defendant being the elder son is rightly in possession thereof as successor to his deceased father: See section 22 clause r. Reference was made to Syke's Compendium of Oudh Taluqdari Law, pages 285, 378, 382, 393 and 403: Letter dated the 10th

P. O.

1918.

Janki Pershad

v.
Dwarkan Pershad.

P. O.

1912.

Janki Pershad

Dwarkan Pershad.

October 1859 scheduled to Act 1 of 1869: and the Oudh Land Revenue Act (Act XVII of 1876), section 17.

Both Courts in India have found that the custom of impartibility applies to the family estate and the presumption is that the devolution of the other family property would take place according to that custom unless the plaintiff could displace such presumption:

Thakur Ishri Singh v. Baldeo Singh (1): *Fagdish Bahadur v. Sheo Partab Singh* (2): *Nawab Ibrahim Ali Khan v. Nawab Muhammad Ahsan Ulla Khan* (3): and *Rajindra Bahadur Singh v. Rani Raghubans Kuar* (4).

[*De Gruyther, K. C.*: The last case is under appeal to your Lordships' Board.]

[*Mr. Ameer Ali* mentioned the case of *Debi Bakhsh Singh v. Chandrabhan Singh* (5).]

There is no evidence to show that the other property is exempted from the application of the custom of impartibility. The suit therefore should be dismissed.

De. Gruyther K. C., and *Dube*, for the Plaintiff: The summary settlement was not made, as required by section 3 of Act 1 of 1869, between 1st April 1858 and 10th October 1859. It was made on the 13th October 1859, when the *Kabuliat* was executed. There is therefore no 'Estate' in this case within the meaning of the Act. Assuming that the summary settlement was made on the 5th October 1859 when the order therefor was made, it was not made with Autar as Taluqdar, but as Malguzar. The word Taluqdar had not acquired in 1859 the statutory meaning given to it under Act 1 of 1869. The villages settled in 1859 are therefore not an 'Estate' within the meaning of the Act and section 22 thereof has no application.

[*LORD MOULTON*: Autar is put in the lists prepared under the Act as a taluqdar and we cannot go outside it. If summary settlement of Government revenue was made with him, it is sufficient for the purpose of section 3 of the Act].

Reference was made to Syke's Compendium of the Oudh Taluqdari Law pages 13, 28, 29, 51, 53, 55 & 285; and Parliamentary papers relating to Oudh, 1859.

It is, however, contended that a family custom of impartibility is established. But before the settlement with Autar there are instances to show that the family property

(1) (1884) L. B. 11 I. A. 185 (148); I. L. B. 10 Oudh. 792.

(2) (1901) L. B. 28 I. A. 100 (110); I. L. 28 All. 869.

(3) (1912) L. B. 89 I. A. 85; I. L. B. 39 Oudh. 711.

(4) (1908) 11 Oudh Cases, 256 (259).

(5) (1910) L. B. 37 I. A. 168; I. L. B. 32 All. 599.

was partitioned and since that settlement no occasion to partition had arisen. The alleged custom is therefore not established. Reference was made to Mayne on Hindu Law and Usage, 7th ed., pages 61, 633, § 54 § 469: *Hyder Hossain v. Mahomed Hossain* (1); and *Bhau Nanaji Upat v. Sundra Bai* (2). Autar executed the *kabuliat* in 1859 as representing the family and the property then settled as well as that acquired thereafter is partible and governed by the ordinary rules of succession under the Hindu Law. In any case the subsequently acquired property is partible.

[LORD SHAW referred to *Srimati Rani Parbati Kumari Debi v. Jagadis Chunder Dhabal* (3).]

There is no specific evidence to show that the subsequently acquired property was intended to be included in the original estate.

Sir H. Erle Richards, K. C., in reply.

The Judgment of their Lordships was delivered by

Mr. Ameer Ali.—These are two consolidated appeals from a judgment and decree of the Court of the Judicial Commissioner of Oudh, dated the 8th of September 1909, and arise out of a suit brought by the plaintiff Dwarka Pershad in the Court of the Subordinate Judge of Barabanki, for partition of certain properties known as *taluka* Ranimau, in which he claimed a share as a member of a joint Hindu family governed by the Mitakshara Law.

The two defendants to this action were the plaintiff's elder brother Janki Pershad and their mother Marjad Kuar, and as the mother under the Mitakshara Law, is entitled on the partition of ancestral property to an equal share with the sons for her life, the plaintiff asked for a decree in respect of a third share in the entire property included in the list attached to the plaint.

The defendant Janki Pershad alone contested the suit, the ground of his defence being that the *taluka* sued for was, under the provisions of Act I of 1869, as also by custom governing the family, an impartible estate descendible to a single heir, to which the ordinary rules of the Hindu Law of inheritance did not apply. The parties thus went to trial on two distinct issues, *vis.*, whether the properties in suit belonged to a joint Hindu family and were subject to the incidents ordinarily attached to

(1) (1872) 14 M. L. A. 401.

(2) (1874) 11 B. H. C. B. 249. (3) (1902) L. R. 29 I. A. 82; I. L. R. 29 Cal. 433.

P. C.

1915.

Janki Pershad

v.
Dwarka Pershad.

June, 10.

P. O.

1913.

Janki Pershad

Dwarkan Pershad,

Mr. Anwar Ali,

such properties, or whether they formed in whole or in part, under Act I of 1869 or by custom, an impartible estate.

A short history of the family will explain the reasons on which the Courts in India have proceeded in arriving at their conclusions. The nucleus of the *taluga* in dispute is said to have been formed by one Suk Shah. He owned nine villages, but the number increased to sixteen in the hands of his son and successor, Sakat Singh, who lived about the close of the 18th century. In 1856, when the British first occupied the kingdom of Oudh, the *taluga* included 21 villages, and was held, by Autar Singh, eighth in descent from Gulal Shah, the original ancestor of the parties and the grand-father of Suk Shah. On the outbreak of the Mutiny Autar is said to have disappeared. Nor did he make his appearance on Lord Canning's famous proclamation issued in March 1858. The British authorities accordingly proceeded to make a settlement of his confiscated villages with third parties. But sometime in July 1859 Autar appeared before the authorities, explained the reason of his non-appearance before, and applied for a settlement of his villages. They were apparently satisfied with his explanation, and on the 5th of October 1859, an order was passed on his application, sanctioning the summary settlement with him of the remaining nine villages which had not been finally settled with others. The *kabuliat*, however, was not signed by him until the 13th of that month.

In the course of the regular settlement which followed shortly after, Autar recovered decrees for possession of six more villages. He was thus in possession of some 15 villages when Act I of 1869 was passed into law. Later on he acquired by purchase several other properties.

Autar died in 1879 without issue and was succeeded in the possession of the properties by his nephew Jang Bahadoor, the eldest son of his brother Bisheshur. Jang Bahadoor died in 1889, leaving him surviving two sons, *viz.*, the plaintiff and the defendant, Janki Pershad, the latter being the eldest. On Jang Bahadoor's death, Janki Pershad came into the possession of the entire property.

The Subordinate Judge has held that the properties which were settled with Autar in 1859, together with those decreed to him in the course of the regular settlement, form an "Estate" within the meaning of Act I of 1869 and are descendible to a single heir and are consequently impartible. But as regards

the several properties Autar Singh acquired by purchase subsequent to the regular settlement the trial Judge was of opinion that in the absence of evidence establishing an intention on his part to incorporate the subsequent acquisitions with the "Estate" they must be held to be governed by the ordinary Hindu law of inheritance. He accordingly decreed the plaintiff's claim in respect of a one-third share in what he calls the "acquired" properties and dismissed the suit as regards the rest.

Both parties appealed to the Court of the Judicial Commissioner of Oudh which affirmed the decree of the Subordinate Judge with a modification in respect of the parties' shares necessitated by the death of their mother Marjad Kuar, which became one-half each instead of one-third.

The plaintiff and the defendant have both appealed to His Majesty in Council against the judgment and decree of the appellate Court. The plaintiff contends that the lower Courts are wrong in holding that the properties in respect of which his suit has been dismissed, form an "Estate" within the meaning of the Act, and are, consequently, impartible; whilst the defendant urges that the properties, a half share of which has been decreed to the plaintiff, being accretions to the "Estate" or *taluqa*, are equally impartible.

As regards the contention of the plaintiff, the first point to determine is the meaning which the Legislature has attached to the word "Estate" with reference to properties coming within the purview of Act I of 1869, and that meaning must be gathered so far as possible from the enactment itself.

The term "Estate" is defined in section 2 to mean "the *taluqa* or immovable property acquired or held by a taluqdar or grantee in the manner mentioned in section 3, section 4 or section 5 or the immovable property conferred by a special grant of the British Government upon a grantee." And "taluqdar" is declared to mean a person whose name is entered in the first of the lists mentioned in section 8.

Section 3 declares that:

"Every taluqdar with whom a summary settlement of the Government revenue was made between the first day of April 1858 and the tenth day of October 1859, or to whom, before the passing of this Act and subsequently to the first day of April 1858, a taluqdari *sannad* has been granted, shall be deemed to have thereby acquired a permanent, heritable and transferable right in the estate comprising the villages and lands named in

P. G.

1815.

Janki Perahad

Dwarka Perahad.

Mr. Anwar Ali.

P. C.

1918.

Janki Pershad

Dwarkan Pershad.

Mr. Ameer Ali.

the list attached to the agreement or *kabuliat* executed by such taluqdar when such settlement was made, or which may have been or may be decreed to him by the Court of an officer engaged in making the first regular settlement of the province of Oudh, such decrees not having been appealed from within the time limited for appealing against it, or, if appealed from, having been affirmed."

Section 8 provides that :

"Within six months after the passing of this Act, the Chief Commissioner of Oudh . . . shall cause to be prepared six lists, namely :

"*First*.—A list of all persons who are to be considered taluqdars within the meaning of this Act."

"*Second*.—A list of the taluqdars whose estates, according to the custom of the family on and before the thirteenth day of February 1856, ordinarily devolved upon a single heir."

The rest of the section is immaterial for the purposes of this case. Section 22 lays down the rules relating to intestate succession to the estates of taluqdars whose names have been entered in the second, third or fifth of the lists mentioned in section 8. In the first instance it declares that if any taluqdar whose name is so entered were to die intestate as to his estate, such estate shall descend "to the eldest son of such taluqdar or grantee, heir or legatee, and his male lineal descendants, subject to the same conditions and in the same manner as the estate was held by the deceased."

It is common ground that "a summary settlement of the Government revenue" was made with Autar Singh in respect of nine villages "between the 1st day of April 1858 and the 10th day of October 1859." Their Lordships are not omitting from consideration the fact that the *kabuliat* was not executed until the 13th of October. To this they will advert later. It is also admitted that he obtained decrees in respect of six other villages in the first regular settlement of the Province, and that his name was entered in the lists prepared under the statutory provisions of section 8. It is clear, therefore, that Autar was not only a taluqdar, but that his *taluqa* acquired by virtue of the above-recited proceedings, was an "Estate" within the meaning of the Act.

One of the learned Judges in the Court below has considered that the execution of the *kabuliat* after the time limit mentioned in section 3, deprived Autar Singh's *taluqa* of the character of

an estate defined in the statute, although in his conclusion he agreed with the Subordinate Judge in holding that it was impartible property. His view may shortly be summarised as follows: as the principal villages included in the *taluka* were not acquired either under a grant or a summary settlement made between the two dates mentioned in section 3, the property did not constitute an "Estate" defined in section 2; but as it appeared in the evidence that the *taluka* had ordinarily devolved upon a single heir on and before the 13th of February 1856, it must be treated as an impartible estate descendible under the rules of devolution provided in section 22.

The other learned Judge held in substance that under the circumstances of the case it may fairly be assumed that the summary settlement with Autar was made before the 10th of October 1859.

In their Lordships' judgment, the less technical construction seems more in accord with the true intent of the enactment. It is easily conceivable that a settlement might be made within the time-limit, and yet the formal documents connected therewith might not, owing to causes beyond the control of the person with whom the settlement is made, be executed until later. The law must be absolutely explicit that non-execution within the time is fatal to the right which it expressly gives before it can be so construed. Clause 3, which declares the right a taluqdar acquires in villages and lands settled with him, states that "he shall be deemed to have acquired thereby," (that is by the summary settlement), "a permanent heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or *kabuliat* executed by such taluqdar when such settlement was made." The right the taluqdar is declared to have acquired comes into existence with the settlement, the rest of the clause merely describes the properties with respect to which it takes effect. If the settlement was directed, on the 5th of October, to be made with Autar Singh, the delay in the signing of the formal documents would not affect the right he acquired thereby, as the execution of the agreement would relate back to the time when the settlement was in fact made. The authorities charged with the execution of the duties imposed by section 8 of the Act do not appear to have considered that the delay which had occurred in the signing of the *kabuliat* affected Autar Singh's rights in the properties settled with him in 1859, or differentiated him

P. O.

1919.

Janki Parashad

Dwarkan Parashad.

Mr. Anwar Ali.

P. O.

1918.

Janki Pershad

v.
Dwarkan Pershad.Mr. Ancoo Ali.

from the other Taluqdars; and although the settlement had been made with him as *malgusar*, he was, in fact, included as a Taluqdar in the General Lists prepared under the section, and the property of Ranimau was entered against his name as the estate in his possession. Section 10 of the Act provides that "the Courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such Taluqdars or Grantees."

Their Lordships have no hesitation in holding that the properties settled with Autar Singh in 1859, together with those of which he obtained possession under decrees passed in his favour in the course of the regular settlement, constitute an "Estate" within the meaning of the Act, and are consequently impartible.

The defendant's appeal relates to that portion of the lower Court's decree which, affirming the order of the Subordinate Judge, awarded to the plaintiff a half share in the properties subsequently acquired by Autar Singh. Janki Pershad has died since the institution of this appeal, and he is now represented by his minor son Dharaband Singh. It is contended on his behalf that by the custom of the family these acquisitions became part of the original estate, and are, therefore, not subject to the ordinary rules of inheritance.

Both the Courts in India have come to the conclusion that the evidence is insufficient to establish the alleged custom. And no adequate reason has been shown to induce their Lordships to take a different view. The only other point that remains to be considered is whether the lands subsequently acquired were as a matter of fact incorporated with the *taluga*. As has been pointed out by this Board in the case of *Purbati Kumari Debi v. Jagadis Chunder Dhabal* (1), the question whether properties acquired by an owner become part of "the ancestral estate for the purpose of his succession," depends on his intention to incorporate the acquisitions with the original estate.

The Courts in India have concurrently found against the defendant on this point, and their Lordships see no reason to differ from their conclusion. Both Courts appear, however, to have fallen into an error in respect of one property, Kamrauli, for a half share of which they have made a decree in favour of the plaintiff. It is admitted on his behalf that Kamrauli is one of the villages for which Autar Singh obtained a decree in the

(1) (1903) L. R. 29 L. A. 82.

regular settlement proceedings. The decree of the lower Court must, therefore, be varied by the elimination of Kamrauli:

Subject to this variation both appeals will be dismissed, each party bearing his own costs.

And their Lordships will humbly advise His Majesty accordingly.

Solicitor for the Defendant.—*The Solicitor, India Office.*

Solicitors for the Plaintiff.—*Barrow, Roger & Nevill.*

J. M. P.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice N. Chatterjee and Mr. Justice Walmsley.

RAM NATH SINGH AND OTHERS

v.

BASANTA NARAIN SINGH AND OTHERS.*

Suit for accounts—Preliminary decree, appeal against—Final decree, passed during pendency of appeal—Appellate Court, jurisdiction of, to set aside preliminary decree—Preliminary decree, setting aside of, effect of—Final decree, whether superseded—Final decree, formal setting aside of, whether necessary—Executing Court, power of.

Where in a suit for accounts a preliminary decree was passed, and the defendant preferred an appeal against the preliminary decree, and it was set aside by the appellate Court, which held that the defendant was not liable to render any account, and, notwithstanding that the defendant had appealed against the preliminary decree, the Court of first instance proceeded with the matter of taking of accounts and passed a final decree for a definite sum during the pendency of the appeal, and the defendant did not take any part in the proceedings before the Court of first instance subsequent to the filing of the appeal against the preliminary decree:

Held, upon an application for execution of the final decree by the plaintiff, that the final decree could not be executed inasmuch as it was subordinate to and dependant upon the preliminary decree, and it must be taken to have been superseded by the decision of the appellate Court setting aside the preliminary decree, and that it was not necessary to have the final decree formally set aside.

Kama Purshad Roy Chowdhry v. Harro Purshad Roy Chowdhry (1) and *Jogesh Chander Dutt v. Kali Charn Dutt* (2) followed.

M. H. Mackenzie v. Lala Narsingh Sahai (3), *Madhu Sudan Sen v. Kamal Kanta Sen* (4) and *Baikunta Nath Dey v. Nawab Salimulla Bahadur* (5) distinguished:

* Appeal from Appellate Order No. 488 of 1912, against the order of F. M. Ince Esq., Offg. District Judge of Gaya, dated the 28th of February, 1912, affirming that of Babu Bakhal Chandra Baru, Subordinate Judge, 1st. Court, at Gaya, dated the 6th of November, 1911.

(1) (1885) 10 M. I. A. 202.

(2) (1877) I. L. R. 8 Oml. 30.

(3) (1909) 10 O. L. J. 118.

(4) (1905) I. L. R. 32 Oml. 1028.

(5) (1907) 8 O. L. J. 547.

P. O.

1912.

Janki Purshad.

Dwarka Purshad.

Mr. Anwar Ali.

CIVIL.

1918.

April, 28, 30.

CIVIL.

1918.

Ram Nath

Basanta Narain.

Held, further, that the appellate Court had jurisdiction to hear the appeal against the preliminary decree, and its power was not taken away by the final decree having been passed by the Court of first instance :

Held, also, that it was open to the executing Court to determine whether the decree which it was asked to execute was a subsisting and operative decree or not, and if such a decree had been superseded and was no longer operative, the executing Court was entitled to refuse execution on that ground.

Appeal by the Decree-holders, Ram Nath Singh and others.

This appeal arose out of an application for execution of a decree obtained by the plaintiffs (decree-holders) in a suit for accounts brought against the defendants (judgment-debtors) in the Court of the Subordinate Judge at Gaya. The plaintiffs obtained a preliminary decree on the 21st March, 1908, which directed the defendants to render accounts. The defendants appealed against the preliminary decree on the 21st May, 1908, to the District Judge, and the learned District Judge set aside the preliminary decree on the 11th August 1908, holding that the defendants were not liable to render any accounts. Against this decision of the District Judge the plaintiffs appealed to the High Court, and the High Court dismissed the appeal on the 30th August, 1910. It appeared that although the defendants appealed against the preliminary decree, the Court of first instance proceeded with the matter of taking of accounts, as the proceedings had not been stayed by the appellate Court, and passed a final decree against the defendants on the 28th May, 1908, for a sum of Rs. 1,284-8as. It further appeared that the defendants did not take any part in the proceeding, before the Court of first instance in the matter of taking of accounts. The plaintiffs thereupon made on the 22nd February, 1910, the present application for execution of the final decree obtained by them on the 28th May, 1908.

The defendants objected to the execution of the decree on the ground that the preliminary decree on the basis of which the subsequent final decree was passed having been set aside by the appellate Court, the final decree must be taken to have been superseded, and could not be executed.

The learned Subordinate Judge gave effect to the contention of the defendants judgment-debtors, and dismissed the application for execution. On appeal the learned District Judge affirmed the decision of the first Court.

Against that decision the decree-holders appealed to the High Court.

Babus Provash Chandra Mitter and *Satis Chandra Bose* for the Appellants.

Babus Umakali Mukherjee and *Atul Chanara Dutt* for the Respondents.

The judgment of the Court was delivered by

N. Chatterjee J.—This appeal is against an order passed by the District Judge of Gaya in certain proceedings in execution of a decree in a suit for accounts. The decree-holders who are the appellants in this Court in a suit for accounts obtained a preliminary decree which directed the defendant to render accounts. This preliminary decree was passed on the 21st March 1908. The defendant appealed against that decree on the 21st May 1908. Notwithstanding that the defendant appealed against the preliminary decree, the Court of first instance proceeded with the matter of accounts (the proceedings not having been stayed by the appellate Court), and passed a decree for Rs. 1,284-8as. against the defendant on the 28th May 1908. It does not appear that the defendant took any part in the proceedings before the Court of first instance in the matter of taking of accounts or that he even appeared before that Court subsequent to the filing of the appeal against the preliminary decree. On the 11th August 1908, the District Judge set aside the preliminary decree holding that the defendant was not liable to render any account. There was an appeal by the plaintiffs against this decision of the District Judge to the High Court and the High Court dismissed the appeal on the 30th August 1910. On the 22nd February 1910, the decree-holders applied for execution of the final decree which had been passed by the first Court on the 28th May 1908. The defendant objected to the execution on the ground that, the preliminary decree on the basis of which the subsequent final decree was passed having been set aside, the final decree which was subordinate to and dependent upon the preliminary decree must be taken to have been superseded and that, therefore the final decree could not be executed. Both the Courts below have given effect to this contention and the plaintiffs have appealed to this Court.

It is contended on behalf of the appellants that the final decree can be executed so long as it remains unreversed and that the appeal against the preliminary decree was not maintainable, when a final decree had already been passed in the case; and reliance is placed upon several decisions of this Court, namely, in the cases of *M. H. Mackenzie v. Lala Narsingh Sahai* (1)

(1) (1909) 10 C. L. J. 118.

ORILL.

1918.

Ram Nath

Banshi Narain.

April 30.

CIVIL.

1918.

Ram Nath

v.

Basanta Narain.

N. Chatterjee, J.

Baikunta Nath Dey v. Nawab Salimulla Bahadur (1) and *Madhu Sudan Sen v. Kamini Kanta Sen* (2) and also upon the case of *Kuriya Mal v. Bishambhar Das* (3). It has, no doubt, been laid down in these cases that, when a final decree has been made, it is not only open but it is the duty of the party, who is aggrieved by the preliminary decree or interlocutory order which up to that stage had not been questioned by way of appeal, to prefer an appeal against the final decree and to question the validity of the preliminary decree or interlocutory order. But in all those cases, except the case in *Baikunta Nath Dey v. Nawab Salimulla Bahadur* (1), the appeal against the preliminary decree or the interlocutory order was presented after the final decree had been passed, and the fact that a final decree had been passed having been brought to the notice of the appellate Court at the hearing of the appeal from the preliminary decree or interlocutory order, it was held that the final decree having been passed, the appeal against the preliminary decree or interlocutory order could not be maintained. The facts of the case in *Baikunta v. Nawab Salimulla* (1) were peculiar. There, the plaintiff having lost in the Court of first instance appealed and himself obtained an order of remand from the appellate Court to appoint a Commissioner for ascertaining whether the lands in suit appertained to the plaintiff's *putni*. The order of remand was made by consent of both parties. The plaintiff appeared before the Munsiff after the order of remand, assisted in the local investigation held by the Commissioner, but at the final hearing by the Munsiff, when asked to argue the case, he refused to do so upon an erroneous assertion that an appeal had been lodged in the High Court against the order of remand. After the arguments on the side of the defendant were finished but before the judgment was actually delivered, the plaintiff preferred an appeal to the High Court against the order of remand and, when that appeal came on for hearing, the fact that a final decree had already been passed was brought to the notice of the Court, and this Court held that the plaintiff having made his election and taken the full benefit of the order of remand, which was passed with the consent of both parties, could not turn round and complain against the order of remand. In this case, the defendant preferred an appeal against the preliminary decree before the final decree was passed, and he does not appear to have taken any part in the proceedings subsequent to the filing of his appeal. At the time when he preferred the

(1) (1907) 8 C. L. J. 547.

(2) (1905) I. L. R. 83 Cal. 1028, (3) (1910) I. L. R. 32 All. 225.

appeal, no final decree had been passed. The appellate Court, therefore, certainly had jurisdiction to hear the appeal, and that power of the appellate Court to hear the appeal against the preliminary decree was not taken away by the final decree passed by the Court of first instance on the 28th May 1908. The final decree in the case, which merely determined the amount for which the defendant was liable to the plaintiffs, was dependent upon the preliminary decree which held that the defendant was liable to render accounts, and the validity of the proceedings which resulted in the final decree depended upon the preliminary decree itself, and, that decree having been set aside on appeal, the final decree necessarily fell through.

It has next been contended that it was, at any rate, necessary to have the final decree formally set aside and that at all events, the question could not be gone into in execution proceedings and that the executing Court has no power to deal with the matter. We think, however, that the final decree was superseded by the order of the appellate Court setting aside the preliminary decree upon which it depended. In the case of *Jatinga Valley Tea Company v. Chera Tea Company* (1) it was pointed out that the Munsif's jurisdiction to hear the case upon remand depended upon the remand order and that, if the remand order were badly made, the decree and, indeed, all the proceedings taken under that remand order were null and void. It is true that, in that case, the final decree was also expressly set aside by this Court but the fact that a final decree had been passed was brought to the notice of this Court at the hearing of the appeal in that case. In the present case, although the plaintiffs were perfectly aware that a final decree had been passed in the case, they did not bring it to the notice of either the first Court of appeal or the High Court. We are of opinion, on the principles laid down in the case of *Shama Purshad Roy Chowdery v. Hurro Purshad Roy Chowdery* (2) and in the case of *Jogesh Chunder Dutt v. Kali Gharn Dutt* (3) that the final decree in this case which was dependent upon and subordinate to the preliminary decree must be taken to have been superseded by the decision of the appellate Court setting aside the preliminary decree. We are further of opinion that it is perfectly open to the executing Court to determine whether the decree which it is asked to execute is a subsisting and operative decree or not and, if such a decree has been superseded and is no longer operative, the

CIVIL.

1918.

Sam Nath

Bamanta Narain,

N. Chatterjee, J.

(1) (1885) I. L. R. 12 Cal. 45.

(2) (1865) 10 M. I. A. 203 ; (3) (1877) I. L. R. 8 Cal. 80.

QSTL.
1913.
Ram Nath
Basanta Narain
N. Chatterjee, J.

executing Court is entitled to refuse execution on that ground. Having regard to the decision of the appellate Court holding that the defendant was not liable to account at all, the Court of execution was certainly right in holding that the final decree could not be executed. Under these circumstances, the order appealed against seems to us to be perfectly correct and the appeal must, therefore, be dismissed with costs. We assess the hearing fee at two gold mohurs.

A. N. R. C.

Appeal dismissed.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice,
and Sir Asutosh Mookerjee, Knight, Judge.*

NISTARINI DEBI

v.

RAI MOHUN BISWAS AND ANOTHER.*

CIVIL.
1918.
May, 29.

Appeal—Suit for accounts—Preliminary decree, appeal against—Final decree passed pending appeal—Preliminary decree varied in appeal—Final decree, validity of.

Where in a suit for accounts an appeal was preferred against the preliminary decree, and a final decree was subsequently passed during the pendency of the appeal :

Held, (1) that the appeal was competent ; (2) that as the preliminary decree was varied in the appeal, the final decree made on the basis of the original preliminary decree became inoperative, and a fresh final decree had to be made on the basis of the preliminary decree as altered.

Machensis v Narasingh Sahai (1) and *Kuriya Mall v Bishambhar Das* (2) distinguished.

Bafatun v. Bilal Khanum (3) followed.

Narain Das v. Balgobind (4) not followed.

Appeal by the Plaintiff.

In a suit for accounts, a preliminary decree was made by the first Court in favour of the plaintiff on the 8th February 1908. On the 4th March defendants preferred an appeal against that decree to the District Judge. During the pendency of this appeal, the first Court proceeded to make the final decree on the 24th March 1908 on the basis of the preliminary decree. The appeal came to be heard by the District Judge on the 11th April

* Letters Patent Appeal No. 72 of 1910, under Clause 15 of the Letters Patent against the decision of Mr. Justice Vincent dated the 11th July 1910, in Appeal from Appellate Decree No. 2548 of 1908.

See also *Ram Nath v Basanta*, (1913), 17 O. W. N. 868, 18 C. L. J. 209 where the same view is taken.—Rep.

(1) (1909) I. L. R. 36 Calo. 762; 10 O. L. J. 113.

(2) (1910) I. L. R. 32 All. 225.

(3) (1908) I. L. R. 30 Calo. 633.

(4) (1911) I. L. R. 38 All. 528.

following, when the preliminary decree made by the first Court was varied in a material particular. No objection was taken to the hearing of the appeal on the ground that the final decree had been already passed. Against this decision of the District Judge, plaintiff preferred the present second appeal to the High Court.

The appeal came to be heard by Mr. Justice Vincent, who by his judgment dated the 11th July 1910, dismissed the appeal, holding that the District Judge had jurisdiction to hear the appeal against the preliminary decree, notwithstanding that the final decree had been passed during the pendency of the same.

The following judgment was delivered by

Vincent J.—This appeal arises out of a suit for accounts brought by a *pardanashin* lady against a *gomastha*, defendant No. 1.

The plaintiff alleges that the defendant No. 1 was employed in her service from the month of Bhadra 1306 to Agrahan 1310 B. S., when he was dismissed and that the defendant has not rendered to her accounts for this period, and has also not handed over to her all the collection papers.

The plaintiff's suit was decreed in the Court of first instance, the judgment being dated the 8th February 1908.

An appeal was preferred against the preliminary decree in the suit. In the meantime, however, as further proceedings were not stayed, the final decree was passed on the 24th March 1908, against the defendant No. 1. On the 11th April the appeal against the preliminary decree was decided and the defendant No. 1 succeeded to this extent that he was held liable to render accounts to the plaintiff for the period between Ashin and Agrahan 1306 only. The learned District Judge found that in Agrahan 1306, one Dwarika Nath Lashkar was appointed as *gomastha* and acted as the plaintiff's agent in regard to the duties performed before that date by the defendant No. 1 and that the plaintiff, accepted Dwarika Nath as her servant, in place of the defendant No. 1. He was, therefore, of opinion that after the date when Dwarika Nath was appointed the plaintiff was not entitled to call upon the defendant No. 1 for the account of her estate.

Against that decision of the District Judge, this appeal is preferred. Various arguments have been addressed to the Court in support of the appeal. In the first place it is said that the learned District Judge had no jurisdiction to set aside a preliminary

CIVIL.

1918.

Nistarini Debi
c.
Rai Mohun.

1909.

July, 11.

CIVIL.

1918.

Nistarini Debi

v.
Bal Mohun.

Vincent J.

decree of the Munsiff after a final decree had been pronounced in that Court and two cases, *Mackenzie v. Narsingh Sahai* (1) and *Kuriya Mal v. Bishambhar Das* (2) were quoted in support of this contention.

The facts of those cases were, however, entirely different. The appeal there was preferred after the final decree had been pronounced. In the present case, the dates which I have already given, show clearly that the appeal had been preferred before the final decree was prepared. It can not be said in these circumstances that the District Judge had no jurisdiction to deal with the preliminary decree.

It is argued that as no appeal had been preferred against the final decree, it was useless for the District Judge to consider the appeal that was pending before him as the final decree would remain in force whether the preliminary decree was set aside or not. But this argument has very little weight as it appears to me that the effect of the decree of the District Judge is to render all proceedings taken in the lower Court on the original preliminary decree infructuous and of no effect.

The second point is urged that although the defendant No. 2 Dwarika Nath was a party to the original suit, he was not made a party respondent in the appeal by the defendant No. 1 and it was suggested that it was unfair to allow the defendant No. 1 to proceed with the appeal in his absence. It is further suggested, on the findings of fact arrived at by the lower appellate Court, that there should be a joint decree against the defendants Nos. 1 and 2 in this appeal.

The short answer to this is that there was no necessity to bring the defendant No. 2 on the record in the appeal because the plaintiff sought no remedy against him in the Court of first instance and the appellant also did not want any decree against him in the Court of the District Judge; neither can there be any joint decree passed against him and the defendant No. 1 on the plaint as framed because the plaintiff nowhere asks for any such relief in any portion of the pleadings.

The last arguments addressed to the Court is based on section 213 of the Indian Contract Act. It is said that whether the defendant No. 2 was employed or not as a *gomastha* under the plaintiff, the liability of the defendant No. 1 to render accounts to the plaintiff is not affected thereby.

To some extent this contention is true. No doubt the

(1) (1909) I. L. R. 36 Cal. 762. (2) (1910) I. L. R. 32 All. 225

defendant No. 1 is bound to account to the plaintiff for any sum of money he may have received, or any papers in his custody during the whole period of his employment, but he cannot, in my opinion, be made liable to render account for moneys received by Dwarika Nath after Agrahan 1306 after which period it appears that Dwarika Nath was treated by the plaintiff not as a subordinate of the defendant No. 1 but as a *gomastha* of the estate in direct relation with his employer. On this point the learned District Judge says "again and again we find Nani Gopal writing to Dwarika Nath to send money In a letter Exhibit A Nani Gopal blames the addressee *i.e.*, Dwarika Nath for not taking proper steps in a Land Acquisition case," and these remarks were addressed to him. "If I had known you were this sort of man I should not have left you in charge of the estate." Enquiries are then made from him in regard to certain lands which have been settled with tenants.

The learned District Judge goes on to state that the letters unquestionably give the impression that Dwarika Nath was addressed not as an agent of Rai Mohun but as an employee of the estate. The evidence shows that Dwarika Nath dealt directly with the owners of the property, that he collected the rent and that Rai Mohun's duty was probably of a supervisional character. Accepting these findings of fact, it would not in my opinion be reasonable to expect the defendant No. 1 to account to the plaintiff for monies and papers which he had not received of which he had no charge.

In the result it is ordered that the defendant No. 1 do render accounts to the plaintiff from Ashin 1306 to Agrahan 1306 as directed in the decision of the lower Court and further that he also account to the plaintiff for any papers received by him or any sums of money collected or received by him after that date up to the date of his dismissal in 1310.

As the appellant substantially fails in this appeal, he must pay the costs.

Against this decision an appeal was preferred under section 15 of the Letters Patent.

Babu Kritanta Coomarr Bose for the Appellant: After the passing of the final decree, the District Judge had no jurisdiction to hear the appeal against the preliminary decree. The defendant ought to have appealed against the final decree; his failure to do so made it final against him.

CIVIL.

1918.

Nistarini Debi

v.

Rai Mohun.

Vincent J.

CIVIL.

1918.

Nistarini Debi

v.

Raf Mohun.

[JENKINS C. J.—When the appeal against the preliminary decree was preferred, there was no final decree from which to appeal. So the appeal when it commenced was competent. Would it be incompetent by reason of after-events?]

Yes. I rely on *Mackenzie v. Narsingh Sahai* (1) and *Kuriya Mal v. Bishambhar Das* (2).

[JENKINS C. J.—But see *Bafatun v. Bilaiti Khanum* (3), which is precisely in point, unless you say it is disturbed by *Mackenzie v. Narsingh Sahai* (1).]

The proper course of the defendant was to ask the Munsiff to stay the further hearing of the suit. He applied to the District Judge, but the District Judge refused to stay.

[MOOKERJEE J.—Did you ask the District Judge not to decide the appeal, as the final decree had been made?]

No. The case of *Narain Das v. Balgobind* (4) is strongly in my favour.

[MOOKERJEE J.—The defendant is bound to appeal against the preliminary decree. He appeals, and raises questions which go to the root of the matter. Meanwhile the final decree is passed. Is he bound to appeal, although he has no ground of complaint?]

[JENKINS C. J.—Under the English practice, you don't get a stay of accounts by reason of an appeal.]

Babu Fogesh Chandra Roy (with him *Babu Surendra Nath Das Gupta* for the Respondents,) was not called upon.

The judgment of the Court was delivered by

May, 29.

Mookerjee J.—This is an appeal under Clause 15 of the Letters Patent against a decision of Mr. Justice Vincent by which he has modified the decree of the District Judge.

The plaintiff, now appellant before us, brought a suit for accounts against the defendants. A preliminary decree was made in his favour on the 8th of February 1908. An appeal was preferred against that decree on the 4th of March 1908. During the pendency of the appeal, the first Court proceeded to make a final decree on the basis of the preliminary decree on the 24th of March 1908. On the 11th April 1908, the appeal against the preliminary decree was heard. No objection was taken before the District Judge to the effect that he had lost his jurisdiction to hear the appeal because during the pendency thereof the final decree had been made by the Court

(1) (1909) I. L. R. 36 Calo. 762; 10 O. L. J. 118.

(2) (1910) I. L. R. 32 All. 325.

(3) (1908) I. L. R. 30 Calo. 688.

(4) (1911) I. L. R. 38 All. 528.

of first instance. The appeal was heard by the District Judge, and the decree of the Court of first instance was varied in a material particular. An appeal against the decree of the District Judge was then lodged in this Court, and at the hearing it was contended that the District Judge had no jurisdiction to hear the appeal preferred to him, because before he could hear the appeal a final decree had been made by the Court of first instance. In support of this view reliance was placed upon the cases of *Mackenzie v. Narsingh Sahai* (1) and *Kuriya Mal v. Bishambhar Das* (2). The learned Judge rightly held that those cases were distinguishable. In the case of *Mackenzie v. Narsingh Sahai* (1), the appeal against the preliminary decree was preferred after the final decree had been made, and it was ruled that at that stage it was open to the appellant to prefer an appeal against the final decree alone. The same view was taken in the case of *Kuriya Mal v. Bishambhar Das* (2). The cases relied upon consequently did not assist the contention of the appellant. Reliance, however, is now placed upon the case of *Narain Das v. Balgobind* (3) which does support the contention of the appellant. We are not prepared, however, to accept that decision as well-founded on principle; in fact, it is contrary to the decision of this Court in the case of *Bafatun v. Bilaiti Khanum* (4). When the appeal against the preliminary decree was filed, it was undoubtedly competent; but it is contended that the appeal became incompetent as soon as the final decree was made by the Court of first instance. This view clearly can not be supported on principle. The party who obtained the final decree in his favour took it while the preliminary decree was under appeal. The final decree therefore must be deemed subject to the result of that appeal. In the case before us, it has been decided by the District Judge as also by this Court that the preliminary decree as originally made was erroneous. The consequence is that the final decree made on the basis of the erroneous preliminary decree cannot be deemed to be operative. In this view, the decree of Mr. Justice Vincent must be affirmed and this appeal dismissed with costs.

The Court of first instance will now proceed to pass the final decree on the basis of the decision of this Court.

C. C. B.

Appeal dismissed: Decree affirmed.

(1) (1909) 10 O. L. J. 118; I. L. B. 86 Calo. 762.

(2) (1910) I. L. B. 33 All. 225. (8) (1911) I. L. B. 33 All. 528.

(4) (1908) I. L. B. 20 Calo. 688.

CIVIL.

1918.

Nistarini Debi

v.

Rai Mohun.

Mookerjee, J.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice,
and Sir Asutosh Mookerjee, Knight, Judge.*

NILMADHUB MAHTA AND OTHERS

v.

RAJ KISHORE DAS AND OTHERS*.

Judicial decision—Conjecture.

Conjecture is not a sound basis for judicial decision.

Appeal by the Defendants.

Suit for ejectment. The Court of first instance upon a map and report of the civil Court Ameen, which was accepted by both parties without objection, passed a decree partly in favour of the plaintiffs. The first appellate Court did not accept the report of the Ameen on the assumption that the boundary as laid down in the Revenue Survey Map was erroneous and dismissed the suit. The plaintiffs appealed to the High Court.

Babus Bepin Behary Ghose, Lalit Mohan Ghose and Satis Ranjan Chatterjee for the Appellant.

Babu Sib Chandra Palit for the Respondent.

The following judgment was delivered by

Holmwood J.—This is an appeal from the decision of the District Judge of Manbhum, dated the 21st August 1909, reversing the decree of the Subordinate Judge determining the boundary between two villages named Bondi and Chanpad. The Subordinate Judge upon a map and report of the civil Court Ameen which appears to have been accepted by both parties without objection gave a decree partly in favour of the plaintiffs. On appeal the Court of the learned District Judge did not accept the report of the Ameen on the assumption that the boundary as laid down in the Revenue Survey Map was erroneous and the true boundary ought to lie between two hills and not crossing a hill.

Now had the learned Judge had occasion to find that the Commissioner's measurements were wrong and were not in accordance with the revenue survey line, it would have been his duty to remand the case to the Commissioner for further measurement and further enquiry or to appoint a new and more competent commissioner. But it does not appear to me that

* Letters Patent Appeal No. 120 of 1911 under section 15 of the Letters Patent, from the decision of Mr. Justice Holmwood, dated the 28th May 1911, in Appeal from Appellate Decree No. 2794 of 1909, against the decree of D. H. Kingsford Esq., Judicial Commissioner of Chota Nagpur, dated the 21st August 1909, reversing that of Babu Bepin Behary Chatterjee, Subordinate Judge of Manbhum, dated the 30th November 1908.

CIVIL.

1918.

May, 30.

1911.

April, 24.

he had any right to find without evidence that the Revenue Survey line was wrong. As a matter of fact unless the Revenue Survey line of both villages Bondi and Chanpad is very much diverted and contorted it would be impossible to make it pass between two hills. It does not appear either from the Revenue Survey Map or from the map of the Commissioner that as a matter of fact there are two hills between which any path passes. However we are not here concerned in any question of fact.

The only question is whether on the learned Judge's decision it would be necessary to direct the Commissioner to make a fresh enquiry, and I do not think that in this case there is any such necessity. The land consists of 8 bighas more or less of jungle and hill tract. The boundary as laid down by the Commissioner is admittedly that of the Revenue Survey, and there is nothing on the record to show that the Revenue Survey is wrong. The Privy Council case of *Lukhi Narain Jagadeb v. Jodu Nath Deo* (1) to which the learned Subordinate Judge refers seems clearly to indicate that in a case like the present the report which agrees with the Survey Map and which has been accepted by both parties should not be disturbed in appeal by the lower appellate Court. In another Privy Council case *Ranee Surut Soonduree Dossee v. Prosumno Coommar Tagore* (2) reported so long ago as 1870, their Lordships held that the appellate Court should not interfere with the result of local enquiry except on clearly defined and sufficient ground which must be stated in its judgment. Now the grounds which are taken by the learned Judge are vague and indefinite. He imagines that the foot-path between two hills which would inevitably exist in such a position, whether it was near the boundary or not must be the old road now lost sight of, which is said to have been one of the boundaries of the village. Now there is really no ground for such assumption. The *rasta* or foot-path would naturally exist in every valley between hills. But it might very well be that such a position would be entirely unsuitable for a road along which cart traffic might have to pass during the rainy seasons; and it is not in accordance with general experience to find cart roads running along the bottom of narrow valleys. They are always carried on a certain elevation above the flood level. However the old Thulin road is entirely lost and nobody knows where it was. There is therefore no ground for any assumption as to its original position.

The only evidence of the boundary being the Revenue Survey, and there being nothing to show that the Revenue Survey is wrong and there being no finding that the Commissioner's

CIVIL.

1918.

Nilmadhab

v.
Raj Kishore.

Holmwood J.

(1) (1898) 1 L. B. 21 Calo. 504 (2) (1870) 15 W. B. 20 P. C.

CIVIL.

1918.

Nilmadhub

Raj Kishore

Holmwood J.

report is not in accordance with the Revenue Survey the decree and judgment of the lower appellate Court must be set aside and that of the Subordinate Judge restored.

As the other side do not oppose and appear to have agreed to these findings from the first, the plaintiffs will be entitled only to their costs in the lower appellate Court and to the hearing fee in this Court, one gold mohur.

The learned vakil for the respondent not having been present at the original hearing is granted a rehearing to-day. He contends that the appeal is concluded by findings of fact, but I have shown above that the Judge has erred in law in finding not that the measurements are wrong but that he can assume that the original Survey line is wrong because it does not accord with his ideas of where it ought to be. His idea of where it ought to be is all founded on assumption and not on facts. Now the presumption is that the boundary is according to the Revenue Survey Map and it is an error of law to discard it on reasons based on erroneous inferences.

I am therefore unable to review my previous order—the appeal must be allowed as ordered above. No further order is made as to costs.

Against this decision, the defendants preferred an appeal under section 15 of the Letters Patent.

Babus Nilmadhub Bose and Sib Chandra Palit for the Appellants.

Babus Bepin Behary Ghose, Lalit Mohan Ghose and Satis Ranjan Chatterjee for the Respondents.

The judgment of the Court was delivered by

May, 30.

Jenkins C. J.—Conjecture is not a sound basis for judicial decision, and that is the meaning of Mr. Justice Holmwood's criticism on the judgment of the District Judge. He has demonstrated with great carefulness that the judgment of the District Judge had no better basis than conjecture, and we are perfectly in agreement with him on that point. Indeed, the discussion in this Court has only served to show that it was perhaps even more conjectural than was made apparent to Mr. Justice Holmwood. The fact is that the eastern limit of the land in suit is the village limit. The Ameen, the Munsiff and Mr. Justice Holmwood are all in accord in thinking that the Revenue Survey was not erroneous. The learned District Judge thinks that this Revenue Survey was erroneous, and he bases that decision on grounds which have no real foundation. We must, therefore, uphold the judgment of Mr. Justice Holmwood and dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice,
and Sir Asutosh Mookerjee, Knight, Judge.*

ABDUL JALIL

v.

AMAR CHAND PAUL AND OTHERS.*

CIVIL

1918.

May, 27.

*Final decree, effect of—Partition, suit for—Preliminary decree, appeal against—
Final decree, passing of, pending appeal—Preliminary decree, setting
aside of.*

When a preliminary decree for partition has been set aside on appeal, and pending appeal from the preliminary decree, a final decree was passed, no effect remained in the final decree.

Appeal by Defendant No. 4.

Suit for recovery of money due on a mortgage bond dated 25th July, 1899. The property which was mortgaged belonged to Sheikh Tunu and Belayati. The latter instituted a suit for partition on the 1st February, 1899 against Sheikh Tunu. A preliminary decree was passed on the 12th December, 1899, wherein it was held that Belayati had a share of $\frac{2}{3}$ and Tunu $\frac{1}{3}$ in the property. This decree was confirmed on appeal on the 2nd March 1900. But on second appeal to the High Court it was held that the shares of Belayati and Tunu in the property were half and half.

On the 27th March 1900, the lower Court passed a final decree against which there was no appeal. On the 27th April, 1903, an application was made to set aside the final decree on the ground that in appeal to the High Court against the preliminary decree the shares of the parties had been determined. On the rejection of this application on the ground of being informal, an application for review was put in on the 11th August 1903, which was granted on the 9th February 1904. This order was set aside on appeal on the 12th July 1904 on the ground of limitation, and on an appeal against that decision to the High Court it was held on the 26th April, 1906 that no appeal lay. The present suit was instituted by the mortgagee on the 18th February 1907 asking for a declaration that his mortgage formed a charge upon the undivided half share of Sheikh Tunu, the mortgagor.

The first Court gave a decree to the plaintiff holding

* Letters Patent Appeal No. 50 of 1910 under section 15 of the Letters Patent, against the decision of Mr. Justice Sharfuddin, in Appeal from Appellate Decree No. 1697 of 1908, against the decree of B. Panton Esq., Additional District Judge of 24 Pergannas, dated the 31st May, 1908, modifying that of Babu Mohin Chandra Sarkar, Subordinate Judge, 2nd Court of 24 Pergannas dated the 7th September, 1907.

CIVIL.

1918.

Abdul-Jalil

Amar Chandra.

that the lower Court had no jurisdiction to pass the final decree in the partition suit pending the second appeal against the preliminary decree. The appeal by the contesting defendant was allowed. The plaintiff then appealed to the High Court.

Babus Nalini Ranjan Chatterjee and Nagendra Nath Ghose for the Appellant.

Babu Monmotha Nath Mookerjee for the Respondents.

The following judgment was delivered by

1910.

April, 7.

Sharfuddin J.—The suit which has given rise to this second appeal was for recovery of money due upon a mortgage bond dated the 25th July 1899. It appears that the owners of the property that was mortgaged under the above mortgage bond were two persons, namely, Sheik Tunu and Belayati Khanum. The latter of whom instituted a suit for partition of the property on the 18th February 1899 against Sheik Tunu. The mortgage in question was executed sometime after the institution of the partition suit. A preliminary decree was passed by the lower Court in the partition suit on the 12th of December 1899 wherein it was held that Belayati Khanum had a share of $\frac{1}{3}$ and Sheik Tunu $\frac{2}{3}$ in the property. An appeal was preferred to the District Judge against the preliminary decree which was confirmed by him on the 2nd March 1900. But on second appeal to the High Court it was held on the 8th January 1903 that the shares of Belayati Khanum and Sheik Tunu in the property were half and half.

On the 27th March 1900 the lower Court passed a final decree against which there was no appeal.

After the judgment of this Court against the preliminary decree was passed, an application was made to the lower Court on the 27th April 1903 to set aside that final decree on the ground that in appeal to this Court against the preliminary decree the shares of the parties had been determined in accordance with the Mahomedan law to be half and half. This application has been described in the judgment as an informal application. It was rejected; thereupon a formal application for review was put in on the 11th August 1903 before the Subordinate Judge who on the 9th February 1904 granted the application. On an appeal, however, to the District Judge the judgment of the Subordinate Judge was set aside on the 12th July 1904 on the ground of limitation, and on an appeal against that decision to this Court it was held on 26th April 1906 that no appeal lay to this Court. The present suit was instituted by the plaintiff as mortgagee on

the 18th February 1907, asking for a declaration that his mortgage formed a charge upon the undivided half share of the said Sheik Tunu, the mortgagor.

The first Court gave a decree to the plaintiff holding that the lower Court had no jurisdiction to pass the final decree in the partition suit during the pendency of the special appeal against the preliminary decree. The contesting defendant then appealed to the District Judge. The appeal was allowed and hence the present second appeal to this Court by the plaintiff. The question for decision really is as to whether the effect of the decree of this Court against the preliminary decree passed by the lower Court was to nullify the final decree passed by that Court. The point urged on behalf of the appellant is that the final decree was dependent upon and subordinate to the preliminary decree and the final decree only carried out the directions given in the preliminary decree and the preliminary decree having been modified by the High Court subsequently the final decree lost all its force.

It appears that the decree of this Court against the preliminary decree abovementioned has been reported [*Bafatun v. Bilaiti Khanum* (1)]. There were two points before the High Court in that appeal. The first was as to whether the appeal was maintainable inasmuch as the final decree in the partition suit had since been made and had not been appealed against although the time for appealing had long expired. This point was taken as a preliminary objection and the second point was for the determination of the shares of the contending parties in accordance with Mahomedan Law. With regard to the preliminary objection, this Court held that the objection ought not to prevail as the law allows an appeal from a preliminary decree in a partition suit. It was held that the appellants were therefore entitled to prefer second appeal for the purpose of the determination of the question raised in it. It was remarked in that judgment that it should be left to the parties to see what the effects of the appellant not having appealed against the final decree may be. Possibly they may yet appeal against the decree, though out of time, if they can show good and sufficient cause for not preferring an appeal within the time allowed by law. No doubt the question then before this court was not what should be the effect of the final decree under the circumstances. The main question was what were the shares of the two contending

CIVIL

1918.

Abdul Jallil

v.

Amar Oband.

Sharfuddin, J.

(1) (1908) I. L. B. 80 Cal. 688.

CIVIL,

1913.

Abdul Jalil

v.

Amar Chandra

Sharfuddin, J.

parties in accordance with Mahomedan Law. And this Court came to the conclusion that under Mahomedan Law Sheikh Tunu and Belayati Khanum were each entitled to a half share in the property. On behalf of the appellant, I have been referred to the case of *Shama Purshad Roy Chowdery v. Hurro Purshad Roy Chowdery* (1). In this case it was held by their Lordships that "there is no doubt that according to the law of this country—and their Lordships see no reason for holding that it is otherwise in India—money recovered in a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment in which it was recovered remains in force; but this rule of law rests as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and as their Lordships conceive, is recoverable either by summary process, or by a new suit or action. The true question, therefore, in such cases is, whether the decree or the judgment under which the money was originally recovered has been reversed or superseded." I am also referred to the case of *Jogesh Chunder Dutt v. Kali Churn Dutt* (2). This is a Full Bench case. The decision of the Full Bench was that the decrees passed subsequent to the decree that was reversed by the Privy Council were superseded by reason of the first decree having been reversed by the Privy Council. It appears that a certain decree was passed by the High Court enhancing rent and on appeal to the Judicial Committee the judgment of the High Court was reversed. But during the interval between the judgment of this Court and that of the Judicial Committee more than one decree had been obtained by the successful party on the strength of the judgment of this Court. Afterwards as that judgment was set aside by the Privy Council the plaintiff instituted a suit for refund of the difference of the money that he had to pay under the subsequent decrees. It was held by the Full Bench that the suit would lie. On the strength of the above two authorities it is contended on behalf of the appellant that as the preliminary decree which was the ground-work of the final decree, has been set aside by the High Court no effect of the final decree remained. On behalf of the respondent it is contended that the facts of the above two cases are

(1) (1885) 10 M. I. A. 208

(2) (1877) I. L. R. 3 Calo. 80.

distinguishable from those of the present case. But so far as the principle is concerned, I am of opinion that there is no difference. The final decree which was founded upon the preliminary decree ceased to exist as soon as the latter decree was modified by this Court. That being so, the ground-work of the final decree having been set aside, the final decree became ineffectual. In the above circumstances I am of opinion that this appeal ought to prevail.

The appeal is therefore decreed and the order of the Subordinate Judge restored.

The appellant will get his costs in all the Courts.

Against this decision, an appeal was preferred under section 15 of the Letters Patent.

Babus Amarendra Nath Bose and Monmotha Nath Mookerjee for the Appellant.

Babu Nagendra Nath Ghose for the Respondent.

The judgment of the Court was delivered by

Jenkins C. J.—It would be profitless for us to discuss the bearing of the decisions in *Mackenzie v. Narsingh* (1) and *Narain Das v. Balgobind* (2), because in this case we have to deal with the fact that a preliminary decree was passed in appeal by the High Court, after a final decree previously passed by the Court of first instance. How this came about we do not know, but it is a fact from which there is no escape, and we therefore have to see what the result is. The decree of the High Court of the 8th of January 1903, though a preliminary decree, must be regarded as decisive of the rights of the parties, notwithstanding the fact that there had been a prior final decree, and in the special circumstances of this case we have so to determine. It is conceded before us that if the decree of the High Court is to be the governing decree, then the appeal fails. In the view we have taken, therefore, this appeal must fail, and we dismiss it with costs.

A. T. M.

Appeal dismissed.

(1) (1909) I. L. R. 36 Cal. 762.

(2) (1911) I. L. R. 38 All. 538.

ORVIL
1913.
Abdul Jalil
Amar Ohand
Sharfuddin, J.

May, 27.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice,
and Sir Atulosh Mookerjee, Knight, Judge.*

ABDUL GOFFUR

v.

SHEIKH JAMAL AND OTHERS.*

Mortgage or conditional sale—Evidence Act (I of 1872), Sec. 92—Surrounding circumstances—Value of property and consideration money, contrast between—Rule against perpetuities—Redemption, right of.

In determining whether a transaction is a mortgage or a deed of absolute sale with a clause for repurchase, a Judge can take into consideration facts which may legitimately be proved with a view to showing in what manner the language of the documents was related to the existing facts and refer to the contrast between the value of the property and the consideration that passed in money.

A mortgagor's right of redemption is exempt from the operation of the rule against perpetuities.

Appeal by Defendant No. 2.

Suit for redemption.

The material facts are stated in the judgment of Mr. Justice D. Chatterjee.

The question involved in the case was whether the transaction amounted to a mortgage or a sale out and out with a condition for repurchase. The Court of first instance held that the transaction was one of mortgage and decreed the suit. The Court of first appeal, while holding that the transaction was one of mortgage, held that the suit was barred by Article 134 of the Limitation Act. Against that decree the plaintiffs preferred a second appeal to the High Court.

Babu Bijoy Kumar Bhattacharjee for the Appellants.

Babu Foy Gopal Ghosha for the Respondent. C. A. v.

The appeal came on for hearing on the 30th March, 1910 before Mr. Justice D. Chatterjee who delivered the following judgment :

D. Chatterjee J.—The ancestor of the plaintiffs executed in favour of one Abdul Bepari a deed purporting to be an out and out sale in respect of some homestead land on the 17th Asar 1283 with a covenant that if ever the vendor or his sons or

*Letters Patent Appeal No. 43 of 1910 under section 15 of the Letters Patent, from the decision of Mr. Justice D. Chatterjee, dated the 30th March, 1910, in Appeal from Appellate Decree No. 742 of 1908, against the decree of Babu Tarak Chandra Das, Subordinate Judge, 2nd Court of Dacca, dated the 20th December, 1907, reversing that of Babu Rajani Kanta Chatterjee, Munsiff, 1st Court of Dacca, dated the 15th April 1907.

1910.

March, 30.

son's sons and other heirs paid up the price the vendee or his sons or his son's sons or other heirs would be bound to reconvey the homestead. In the same *majlis* the vendor executed in favour of the vendee a *kabuliat* for the lands at a rental of 12 rupees per annum. Abdul Bepari's rights were sold in execution of a decree to Uzirali and Uzirali's rights were sold in execution to his wife who sold the property to defendant No. 2. The plaintiffs bring [this suit for redemption on the ground that the real transaction was one of mortgage. The defence was that the transaction was one of out and out sale and that the defendants were *bonafide* purchasers. The Court of first instance held that the transaction was one of mortgage and decreed the suit, holding that it was governed by article 148 of the second schedule to the Limitation Act of 1877. The learned Subordinate Judge in appeal has reversed the said decree holding that the suit was governed by article 134 and was barred in that it was brought more than 12 years after the transfer.

Both the Courts, therefore, have held that the transaction was one of mortgage and the first question raised by the appellant is that article 134 has no application as the transfer contemplated by that article is transfer by a mortgagee on the assertion that he was the owner and that the auction-sales were not such transfers by the mortgagee and the only transfer by private sale was within 12 years. The learned vakil for the respondent does not seriously contest this point but supports the decree of the lower appellate Court on the plea that the document in question was one of a complete sale and not mortgage and hence the suit is liable to be dismissed in any case, and that the covenant for repurchase is not binding upon him as he is an auction-purchaser. The main question therefore for decision is whether the document is a mortgage or a deed of absolute sale with a clause for repurchase and whether the latter clause can be enforced against an auction-purchaser.

Applying Butler's tests we find first of all that the consideration was not adequate: only 100 rupees was paid for a property which on the same date was settled at a rent of 12 rupees per annum which at 20 years purchase would bring up the price to 240 rupees. The second test whether the vendee was put in immediate possession also favours the mortgage theory for there was no change of possession at all, the sale and the lease being executed in the same *majlis*. Then the rental of

CIVIL.

1913.

Abdul Goffur

Sheikh Jamal.

D. Chatterjee, J.

CIVIL.

1918.

Abdul Goffur.

v.
Sheikh Jamal.

D. O'atterjee, J.

12 rupees per annum was the usual rate of interest for 100 rupees. The parties to the document are Mahomedans amongst whom the receiving of interest is prohibited and various subterfuges are resorted to, one of them being the *bye bil wafa*. One of the tests applied by Mahomedan lawyers for determining whether a document is a *kobala* or a *bye bil wafa* is that a short term indicates a *kobala* and a long term a security: see Ghose on Mortgage, 3rd Ed. p. 121. In this case the term is indefinitely long indicating that an absolute sale was not meant. If a mortgage was meant and not a sale the defendant cannot say that he is not bound. Besides the defendant produces the original *kabala* and does not shew how and from whom he got it, so that he cannot plead a *bonafide* purchase without notice. In this view of the case I set aside the decree of the lower appellate Court and restore decree of the first Court with costs.

Against this decision, Defendant No. 2 preferred an appeal under section 15 of the Letters Patent.

Babus Harendra Narayan Mitra and *Mohini Mohon Chatterjee* for the Appellant.

Babu Bijoy Kumar Bhattacharjee for the Respondents.

The judgment of the Court was delivered by

May, 28.

Jenkins C. J.—This case comes before us by way of appeal from a judgment of Mr. Justice Digambar Chatterjee who has restored the decree of the Munsiff reversing that of the Subordinate Judge. The suit is one for redemption and is based on a transaction of the 17th of Assar 1283. Both the lower Courts considered the transaction to be a mortgage, and the only reason why the lower appellate Court withheld relief was that it considered that there was the bar of limitation. Mr. Justice Chatterjee too considered the transaction to be a mortgage. The argument before us has been that it was not open to him to regard the transaction as a mortgage. I designedly use the word *transaction*, because that with which we have to deal is not contained in one document but in two, and what we have to consider, in the circumstances, is whether there is anything in section 92 of the Evidence Act or in *Balkishen Das v. W. T. Legge* (1) which is an exposition of that section—that would compel us to hold that the decision of Mr. Justice Chatterjee is erroneous. We would certainly not willingly infringe the provisions of section 92 or fall to follow what was laid down by Lord Davey in *Balkishen Das's* case, (1) and in order to be sure as to this we have listened with all possible attention to the argument that

(1) (1899) 1, L. R., 22 All. 149.

has been addressed to us. A great deal of that argument has been directed to showing that *Balkishen Das's* case (1) has been differently regarded in different Courts, and while there is a strong tendency in one direction in the Courts of Bombay and Madras, there is a current, perhaps a sluggish one, in the other direction in Calcutta : but it appears to me that all these authorities to which allusion has been made are beside the point in this case, for I cannot find that the learned Judge of this Court has relied on any evidence of oral agreement or statement or of intention, with a view to coming to the conclusion at which he arrived. He took the transaction as it is expressed in the documents : he also took into consideration those facts which may legitimately be proved with a view to showing in what manner the language of the documents was related to the existing facts, and on a consideration of all those facts he has come to the conclusion, as did the two lower Courts, that the transaction really was a mortgage. It has been urged against this that the transaction on the face of it was an out-and-out sale. That is not so: on the face of it, what I would call the principal document is expressed in qualified terms ; and, it is only open to the suggestion that it is an out-and-out sale, if and so far as it can be said that the express terms of the deed must be disregarded in obedience to the rule against perpetuities. The principal document is expressed to be a qualified transfer : it is accompanied by a further document which throws considerable light on the nature and purpose of that qualification, and in the document we have facts which justified the Court in holding that, without reference to any oral agreement or oral statement, the transaction was a mortgage and not a sale. In saying this, I do not forget that the learned Judge referred to the contrast between what he took to be the value of the property and the consideration that passed in money, but in so doing he was not infringing the provisions of section 92 or disregarding anything that was laid down in *Balkishen Das's* case (1). On the contrary, at page 161 in the report of that case it appears that there, too, there was evidence which pointed to a contrast between the value of the property and the consideration that passed. It is true that their Lordships did not place much reliance on that : but it was not suggested that it was not evidence which was legitimately a matter for consideration within the provisions of section 92. The conclusion then to which

CIVIL.

1913.

Abdul Goffur

v.

Sheikh Jamal,

Jenkins, C. J.

(1) (1899) 1, L. R. 22 All. 119.

CIVIL.

1913.

Abdul Goffar

v.

Sheikh Jamal.

Jenkins, C. J.

I come is that I do not think we can hold that there were not legitimate materials on which Mr. Justice Chatterjee, in agreement with the Courts below, was entitled to say that the transaction was a mortgage.

The further points that were urged before us necessarily fail as a result of this conclusion. One of them was that the rule against perpetuities stood in the way of the plaintiffs' redemption; but a mortgagor's right of redemption is exempt from the operation of that rule; similarly the omission of the word "assigns" in the principal document does not appear to me to have any force, when it is established that the transaction was a mortgage.

For these reasons I think the judgment of Mr. Justice Chatterjee should be affirmed and this appeal dismissed with costs.

Mookerjee J.—I agree.

A. T. M.

Appeal dismissed.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice,
and Sir Asutosh Mookerjee, Knight, Judge.*

CHANDRA KUMAR AICH

v.

CHAITANYA CHARAN DE.*

CIVIL.

1913.

May, 30.

Raiyati interest—Land not agricultural or horticultural—Garden not permanent—Act VII (B.C.) of 1868, Secs. 12, 14.

Where the land is not agricultural or horticultural, no raiyati interest can be created in it.

Gardens which are not permanent are not protected from annulment under section 12 of Act VII (B.C.) of 1868.

Appeal by Defendant No. 1.

Suit for ejectment.

The question in appeal was whether the defendant's interest was protected from annulment under sections 12 and 14 of Act VII (B.C.) of 1868. He claimed certain plot as being land in which he was given a permanent raiyati interest and certain others as garden lands. The Courts below decreed the suit. Defendant No. 1 appealed to the High Court, which was heard on the 17th February 1911.

* Letters Patent Appeal No. 55 of 1911 under section 15 of the Letters Patent, from the decision of Mr. Justice Coxe, dated the 28th February 1911, in Appeal from Appellate Decree No. 1688 of 1909, against the decree of Babu Nikunja Behari Roy, Officiating Additional Subordinate Judge of Chittagong, dated the 30th April 1909, affirming that of Babu Saad Chandra Mitra, Munsiff, 1st Court of Chittagong, dated the 10th July, 1908.

Babu Baikuntha Nath Das for the Appellant.

No one appeared for the Respondent.

The following judgment was delivered by

C. A. V.

Coxe J.—The only question that arises in this appeal is whether the defendant's interest is protected from annulment under sections 12, 14 of Bengal Act VII of 1868. He claims plot 7751 as being land in which he was given a permanent raiyati interest and pleads that it is protected from annulment under section 14. Plots 7703, 7704 he acquired by a mortgage and these are said to be garden lands and protected under section 12.

It appears to me that the findings of fact dispose of both these contentions. As regards plot 7751, the learned Subordinate Judge holds that it is not agricultural or horticultural land at all and that consequently no raiyati interest could be created in it. This view is certainly in accordance with the definition of the term "raiayat" in the Bengal Tenancy Act and that definition is in accordance with the former law (*vide* the cases quoted at page 45 of Rampini's Tenancy Act, (Edition of 1899). No evidence is given of the object for which the tenancy was created and the *pattah* produced by the defendants throws no light on the matter. As regards plots 7703, 7704, the lower appellate Court finds that they are not permanent gardens, which is a finding of fact and conclusive in second appeal.

The appeal accordingly will be dismissed.

Against this decision, defendant No. 1 appealed under section 15 of the Letters Patent.

Babu Gunada Charan Sen for the Appellant.

Babu Khitis Chandra Sen for the Respondent.

The judgment of the Court was delivered by

Jenkins C. J.—It is impossible for us to hold that the learned Judge committed an error, in so far as he agreed with the view of the lower appellate Court that it had not been shown that the present appellant was a *raiayat* within the meaning of section 14 of Act VII of 1868. We must, therefore, dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

CIVIL.

1918.

Chandra Kumar

Chaitanya Charan.

1911.

February, 23.

May, 30.

PRIVY COUNCIL.

PRESENT : *Lord Atkinson, Lord Parker of Waddington,
Sir John Edge and Mr. Ameer Ali.*

NET RAM SINGH AND OTHERS

v.

MUSAMMAT TURSA KUNWAR.

P. C.

1913.

July 18 18.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE
NORTH-WESTERN PROVINCES, ALLAHABAD.]

*Hindu Law—Jointness, presumption of—Separation—Evidence—Separate entries
in revenue records—Inferences from the acts of the members of the family.*

Where in a suit the question was whether the plaintiffs, who were brothers, were separate in estate from their deceased half-brother at the time of his death in 1907 and the proved or admitted facts were that the names of the five brothers were separately entered in the revenue records in regard to specified areas of one of the suit villages, that in 1900 they dealt with those areas as separate owners thereof, that in 1878 there was a partition among them of another village, that there was an entry of the deceased half-brother's name alone in respect of a third village, and of the names of the plaintiffs in respect of a fourth village, and that the five brothers enjoyed separately their respective *sir* lands :

Held, affirming the High Court, that the separate entries in the revenue records standing by themselves were not sufficient to rebut the presumption of Hindu Law relating to jointness or to prove separate possession by different members of a family which in its inception was admittedly joint, but that such entries together with the inferences drawn from the said facts, which tended to show a separation and were consistent only with the hypothesis of separation, left no doubt that at the time of his death the deceased half-brother was separate from his brothers, the plaintiffs.

Ex parte appeal from a judgment and decree of the High Court at Allahabad (March 30, 1910) varying those of the Court of the Additional Subordinate Judge of Aligarh (November 30, 1908.)

Suit for ejectment.

The material facts are stated in the judgment of their Lordships.

B. Dube for the Appellants: The *onus* of proving separation is on the respondent, who alleges that her husband was separate: *Prit Koor v. Mahadeo Pershad Singh* (1). Separate entries in the revenue papers of names of the different members of the family, which was admittedly joint at one time, in respect of specified shares of the family property, are not sufficient to rebut the presumption of

jointness or to prove separate possession of such shares by such members: *Gajendar Singh v. Sardar Singh* (1), *Hoolash Koor v. Kassee Proshad* (2) and *Ambika Dat v. Sukhmani Kuar* (3). Some of the entries suggest separation, while others suggest jointness. It is therefore submitted that the respondent has failed to discharge the *onus* of proving separation. Reference was also made to *Rewa Prasad Sukal v. Deo Dutt Ram Sukal* (4).

The Respondent did not appear.

The judgment of their Lordships was delivered by

Mr. Ameer Ali.—The suit, which has given rise to this appeal, was brought by the plaintiffs in the Court of the Subordinate Judge of Aligarh, to obtain a declaration that, as members of a joint undivided Hindu family, they became entitled by right of survivorship to the shares of their half-brother, Chhiddu Singh, in the properties mentioned in the schedule to the plaint, upon his death in 1907. The plaintiffs and Chhiddu Singh are the sons by different mothers of one Narayan Singh, who died in 1879. They allege that after their father's death the family continued joint during the whole of Chhiddu's life-time, and that in 1907, after Chhiddu's death, his widow, Tursa Kunwar, the defendant to the present action, obtained from the Revenue Courts an order to have her name recorded in the Collector's Register as proprietor in place of her deceased husband.

The defendant, Tursa Kunwar, contested the claim on the ground that her husband was at the time of his death separate from his brothers, and that consequently his share in the several properties had rightly devolved on her. In support of her contention she relied mainly on a number of documents consisting chiefly of entries in revenue records and mortgage deeds separately executed by the brothers.

The Subordinate Judge, upon a review of the evidence, was of opinion that the plaintiffs had established their allegation, and accordingly decreed their claim. On appeal, the High Court of Allahabad has taken a different view. It has held in effect that whatever might have been the position among the plaintiffs *inter se*, the evidence and inferences from facts proved left no room for doubt that at the time of his death

(1) (1895) I. L. R. 18 All. 176 (179 and 180).

(2) (1881) I. L. R. 7 Oalc. 869 (871).

(3) (1877) I. L. R. 1 All. 487.

(4) (1899) L. R. 27 I. A. 39; I. L. R. 27 Oalc. 515.

P. O.
1918.
Not Ram
Tursa Kunwar.

July, 18.

P. O.

1913.

Net Ram

v.

Tara Kunwar.

Mr. Amoor Ali.

Chhidu was separate from his brothers. The learned Judges accordingly varied the decree of the Subordinate Judge and dismissed the plaintiffs' suit, save as regards one village, with respect to which they agreed with the lower Court.

The plaintiffs have appealed to His Majesty in Council, and the main contention advanced on their behalf is that the High Court was in error in relying on the entries in the revenue records, which by themselves are not sufficient to rebut the presumption of Hindu law relating to jointness or to prove separate possession by the different members of a family which in its inception was admittedly joint.

Their Lordships, however, observe that the learned Judges in the Court below have not rested their judgment merely on entries which, standing by themselves, may be regarded as inconclusive. They have drawn inferences from the acts of the brothers which are consistent only with the hypothesis of separation. They say:

"Not only do we find this separate entry of names in regard to specified areas of the village Nimgaon, but we further find that on the 8th of March 1900, three separate mortgages were made by Net Ram, Kanhai Singh, and Mukhram Singh, respectively. Each of them purported to mortgage a specified portion of the land in Nimgaon, separately entered in their names, and described it as owned and possessed by him alone. So that not only were their names separately entered in the revenue papers in regard to specified areas, but they dealt with those areas as separate owners thereof."

The plaintiffs made no attempt to explain how, if the brothers were joint, as they allege, at the time of the transactions, separate mortgages were executed by them in respect of specified areas held by each separately in the village of Nimgaon. The circumstances connected with these mortgages were within their knowledge, and it lay upon them to show that the transactions, although separate, were consistent with jointness.

The learned Judges refer also to the admitted partition among the five brothers of the village of Susayan in 1898, to the entry of Chhidu's name alone in respect of one village, and of the names of his four half-brothers in respect of another, to the separate enjoyment of their respective *sir* lands by Chhidu and the plaintiffs all tending to show a separation in estate before Chhidu's death.

On the whole, their Lordships see no reason to disturb the finding of the High Court, and they will, accordingly, humbly advise His Majesty that the appeal be dismissed. As the respondent does not appear there will be no costs.

Barrow Rogers & Nevill:—Solicitors for the Appellants.

The Respondent did not appear.

J. M. P.

Appeal dismissed.

PRESENT: *Lord Atkinson, Lord Parker of Waddington,
Sir John Edge, Sir Samuel Griffith and Mr. Ameer Ali.*

RAMKISHORE KEDARNATH AND OTHERS

v.

JAINARAYAN RAMRACHHPAL AND OTHERS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER,
CENTRAL PROVINCES.]

Hindu Law—Mitakshara—Partition—Ancestral property—Minors—Father's power to bind his minor sons—Share given to a stranger—Practice—Suit by a Hindu governed by the Mitakshara law to set aside his father's alienation of ancestral property—Form of the suit—Nature of relief to be granted—Equity between the father and his alienor.

Although a partition made by a Hindu father of a joint undivided ancestral estate, subject to the Mitakshara law, may, under some circumstances, bind his minor sons, yet if on the partition a share is given to an absolute stranger, the partition may be impeached as a disposition of property made without consideration, unless it can be supported as a *bona fide* compromise of a disputed claim.

Balkishan Das v. Ram Narain Sihra (1) relied upon.

A person, who, as having been adopted in the family, has received a share on partition of the joint undivided ancestral property governed by the Mitakshara law, is in the view of the law an absolute stranger in a suit against him to make restitution of the share so received by him on the ground that his adoption was wholly invalid.

Where a Hindu father governed by the Mitakshara law has given on partition a share of ancestral estate to an absolute stranger, a suit brought by the sons against the recipient of the share and their father to recover possession of the share so given, is bad in form, but it is competent for the Courts to make the whole or any part of the relief granted in such a suit to the sons conditional on their assenting to a partition so far as regards their father's interest in the estate, so as to give effect to any right to which the said recipient may be entitled claiming through their father.

Appeal from a decree of the Court of the Judicial Commissioner, Central Provinces, dated July 26, 1909, affirming a decree of the District Judge, Wardka, dated September 1, 1908.

(1) (1903) L. B. 30 I. A. 189 (150) ; I. L. B. 30 Calc. 783.

P. O.

1913.

Not-Bain-i

Tarna Kishwar,

Mr. Amoor Ali.

P. O.

1913.

June, 19, 20 & 23.

July, 11.

P. C.

1918.

Bamkishore

Jainarayan.

The main question in the appeal was whether the suit had been rightly dismissed on the pleadings and an admission made by the plaintiff's pleader without taking evidence.

The material facts are stated in the judgment of their Lordships.

De Gruyther K. C. and H. Mitra, for the Plaintiffs-Appellants: The admission of the plaintiff's pleader means that their father gave away half the ancestral estate in 1898. The fact that Jaidevi was previously recorded in the revenue books as owner of the property given away in that year to the first defendant did not operate a separation in title or alter its devolution: *Rewa Prasad Sukal v. Deo Dutt Ram Sukal* (1). On her death the plaintiffs and their father as co-parceners became entitled to the property recorded in her name, and their father had no right to give it away to the first defendant without their consent. It is contended that their father made a partition and gave the first defendant his share. If so, the plaintiffs, who were minors are entitled to challenge the partition as the first defendant's adoption being invalid he was not entitled to any share of the ancestral family property: *Balkishen Das v. Ram Narain Sahu* (2) and *Strange's Hindu Law* (1815 ed.) p. 222, ch. 9 on Partition. The plaintiffs contend that the property so given was an alienation by their father and they are entitled to sue to recover it: *Mayne on Hindu law and Usage* p. 439, § 336 (7th ed.).

The District Judge says that the acquiescence of Kedarnath estops his sons from questioning the validity of the first defendant's adoption, but there is no evidence to support that finding. Nor is there evidence to support the finding that the defendant lost his share of the property of his natural family. It is submitted, therefore, that the case has not been rightly decided without taking evidence. There could be no adverse possession from 1887 to 1898 during which period there was joint possession. The suit is not barred as it was instituted within less than three years after the first plaintiff attained majority and the remaining plaintiffs were minors when it was instituted: Limitation Act, (1877), section 7. Omission to bring within 6 years' period provided by Art. 118 of the Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit for possession of property: *Umar Khan v. Niaz-ud-din* (3).

(1) (1899) L. R. 27 I. A. 189, I. L. R. 27 Calo. 515.

(2) (1903) L. R. 80 I. A. 189 (149 & 150), I. L. R. 80 Calo. 793.

(3) (1911) L. R. 89 I. A. 19, (25), I. L. R. 89 Calo. 418.

It is submitted that the case should be sent back without any expression of opinion for trial according to law.

G. R. Lowndes, for the Defendant-Respondents Jainarayan and his alienees: The point now raised that the plaintiffs' father gave the property in 1898 as a gift is a new point. The case in the Courts below was that there was then a partition and the first defendant got a share as he was adopted in the family. The plaintiffs' father who was the head of the family, accepted the fact of Jainarayan's adoption and it is submitted that the plaintiffs are bound by such an acceptance. What took place in 1898 was a family settlement which Kedarnath had the power to make and his sons are bound by it: *Fagan Nath v. Mannu Lal* (1) and Mayne on Hindu Law and Usage, 7th ed., p. 455, § 346.

Both Courts in India have held that Jainarayan's possession was adverse to Kedarnath. His right to recover possession was therefore lost long before the suit was brought and on the date of the suit he had no right to the property sought to be recovered: See Limitation Act, 1877, Art. 144 and section 28. Jainarayan's adverse possession against Kedarnath bars his sons, the plaintiffs: *Radhabai and Ramchandra Konher v. Anantrave Bhagwant Deshpande* (2): The plaintiffs are claiming through their father and their claim is barred in spite of section 7 of the Limitation Act, 1877.

The suit in the present form does not lie. The plaintiffs during the life-time of their father cannot demand possession of the family property. Jainarayan has acquired a good title at least as against Kedarnath and the plaintiffs cannot recover his share. They could sue for partition but not for possession of the whole of the property: *Koor Hasmat Rai v. Sunder Das* (3). Reference was also made to section 14 of the Limitation Act, 1908.

It is submitted that the Courts in India had sufficient materials before them to decide the case.

De Gruyther, K. C., in reply: The plaintiffs sue for the restoration of the property of the joint family and article 126 of Schedule II to the Limitation Act, 1877 contemplated such a suit. If the plaintiffs had sued for their shares, their suit would have been dismissed: *Rajaram Tewaroo v. Luchman Pershad* (4).

(1) (1894) I. L. R. 16 All. 231 (238).

(2) (1885) L. L. R. 9 Bom. 193 (321 & 325).

(3) (1885) I. L. B. 11 Cal. 893, (899).

(4) (1869) 12 W. R. 478.

P. O.

1918.

Bumkishore

c.

Jainarayan.

P. O.

1918.

Ramkishore

Jainarayan.

[LOWNDES:—I do not admit that Central Provinces follow Bengal.]

[SIR JOHN EDGE:—Central Provinces lean towards Allahabad.]

The law on this point is the same as that in Bengal. A single co-parcener is entitled to set aside an alienation.

A suit for partition would break up the joint family as such a suit must include besides the property in suit other joint property. There is no reason why the plaintiffs should be compelled to break up the joint family and forced to bring an action for partition, when they are entitled to joint possession with their father: *Naranbhai v. Ranchod* (1) and *Radha Prashad Wasti v. Enuf* (2). There is no equity between the alienor of joint property and his alienees: *Madho Purshad v. Mehrbain Singh* (3). But even if Jainarayan is entitled to retain Kedarnath's share, the Court could give possession of the whole of the property in suit to the plaintiffs with a declaration that Jainarayan had acquired Kedarnath's share and was entitled to have it partitioned: *Deendayal Lal v. Jugdeep Narain Singh* (4), *Baboo Hurday Narain Sahu v. Pundit Baboo Rooder Perakash Misser* (5) and Mayne on Hindu Law and Usage, 7th ed., pp. 483 and 485, § 364 and 365. To deny any relief except in a partition suit would be to deny the plaintiffs' right to relief altogether. Moreover, the form of the suit does not affect the merits of the case and no suit shall be dismissed in appeal except on the merits of the case: Code of Civil Procedure, 1882, section 578.

The contention that the suit is barred against the plaintiffs' father and therefore against the plaintiffs, depends upon the question how the father's acts would bind the sons. It is a question of fact and cannot be decided without evidence.

The judgment of their Lordships was delivered by

July, 11.

Sir Samuel Griffith.—This was a suit instituted—to use the words of Art. 126, of Schedule II, to the Indian Limitation Act of 1877—"by a Hindu governed by the law of the Mitakshara, to set aside his father's alienation of ancestral property."

The plaintiffs, the appellants, are the four sons of the defendant Kedarnath. The defendants are one Jainarayan, Kedarnath, and certain assignees from the former. The case made by the

(1) (1901) I. L. R. 28 Bom. 141 (145).

(2) (1881) I. L. R. 7 Calo. 414.

(3) (1890) I. L. R. 17 I. A. 104; I. L. R. 18 Calo. 157.

(4) (1877) I. L. R. 4 I. A. 247; I. L. R. 3 Calo. 198.

(5) (1883) I. L. R. 11 I. A. 26 (80); I. L. R. 10 Calo. 626.

plaint, so far as material to the present appeal, is that the plaintiffs and their father were the owners of a joint undivided ancestral estate subject to the Mitakshara law, and that Kedarnath, in October 1898, improperly made a disposition of part of it by way of partition to the defendant Jainarayan. The relief formally claimed was that "each of the defendants may be ordered to deliver them the possession of whatever property he has with him out of that mentioned in paragraph 11." with consequential relief.

The suit was instituted on 20th December 1907. The first plaintiff was alleged to have been born on 20th December 1886, the other plaintiffs being younger. The plaintiffs alleged that the estate had descended to two brothers, Ramnath and Rambilas, neither of whom had issue, that in 1877 the former adopted the defendant Kedarnath, that Rambilas died in 1881 and Ramnath in 1883, whereupon Kedarnath became solely entitled, that about 1886 or 1887 the widow of Rambilas, whose name had previously, with the consent of Ramnath, been entered in the local register as a joint owner in place of Rambilas, adopted Jainarayan as the son of Rambilas, and that his name was thereupon entered as owner in her place, that the adoption of Jainarayan was invalid for various reasons stated, and that in 1898 Kedarnath "gave" a specific part of the estate to Jainarayan, who has since claimed and enjoyed the separate possession of it. Under these circumstances, the plaintiffs claimed restitution of the part so given.

Amongst other defences, Jainarayan set up that the plaintiffs are bound by the acquiescence of their father Kedarnath in the admission of Jainarayan to the family, and that the suit is barred by the Limitation Act.

In proceedings before the District Judge for the purpose of settling preliminary issues of law, the plaintiffs' pleader admitted that "plaintiffs' father had actually given possession of the property in suit to defendant No. 1 (Jainarayan) to enjoy it exclusively by himself in 1898. Previously he was living as a joint member and jointly enjoying the property by reason of plaintiffs' father's inaction and acquiescence in this mode of enjoyment." The case was decided in the Courts below upon the allegations in the plaint, together with this admission. The first three issues were finally settled as follows :—

1. Whether plaintiffs can maintain the suit in its present form without suing for partition?

P.O.
1918.
Ramkishore
v.
Jainarayan.
Sir Samuel Griffith.

P. O.

1913.

Bamkishore

v.

Jainarayan.

Sir Samuel Griffith.

2. Are plaintiffs bound by the acquiescence of their father in admitting defendant No. 1 into the family and allowing him a share in the property?

3. Since defendant No. 1 has been in joint possession of property with Kedarnath since 1887 and in separate possession of his share since 1897-98, has he acquired an absolute title to the property in dispute? If plaintiffs' father's claim is time-barred, has their claim become time-barred also?

There was some controversy as to the effect of the admission already stated. But their Lordships think that, as the issues were settled in presence of the parties, it must be construed in the sense recited in the third issue. The learned Judge of first instance answered the first and second issues in the affirmative, and as to the third issue held that the defendant Jainarayan had acquired an absolute title to the property in suit by adverse possession for more than 12 years.

On appeal to the Court of the Judicial Commissioner, the learned Additional Commissioner held that as the first plaintiff had instituted the suit within three years of attaining the age of 21, he was entitled to the benefit of section 7 of the Limitation Act of 1877 and the suit was not barred as against him, but he held that it was barred as against his younger brothers, who were born after the commencement of what he regarded as the adverse possession of the defendant Jainarayan. It was, however, conceded before his Board, and as their Lordships think, rightly conceded, that if the first plaintiff succeeds in the suit his younger brothers born before a partition of the estate will be entitled to share in the relief.

The learned Additional Commissioner also held that the first plaintiff was bound by his father Kedarnath's acquiescence in Jainarayan's joint enjoyment of the family property and consent to a partition with him, since in such acquiescence and consent he must be held to have acted in a representative and not in a personal capacity.

The basis of the suit is that the adoption of Jainarayan was wholly invalid, in which case he was in the view of the law an absolute stranger. It is not disputed that the validity of an adoption may be contested by persons prejudicially affected by it. And it seems to their Lordships to be clear that, although a partition made by a Hindu father may under some circumstances bind his minor sons, as was held by this Board in *Balkishen Das and others v. Ram Narain Sahu and others* (1), yet

(1) (1903) L. R. 30 I. A. 129 (150).

If on the partition a share is given to an absolute stranger the partition may be impeached as a disposition of property made without consideration, unless it can be supported as a *bona fide* compromise of a disputed claim. There are no materials before the Board to enable them to form a conclusion in favour of the respondent on this ground, as suggested by the learned Additional Judicial Commissioner, even if such a case had been set up by him.

Their Lordships are therefore of opinion that if the adoption of Jainarayan was wholly invalid the plaintiffs would be entitled to succeed in the absence of any other defence.

With respect to the form of suit, it was rightly pointed out by the learned Counsel for the appellants that to deny any relief except in a suit for partition would be to deny the right of relief altogether, since the basis of their claim is that they are still entitled to the estate as a joint undivided estate, and desire to enjoy it as such. It may well be, however, that, as between Kedarnath and Jainarayan, the latter may be entitled to insist that he stands in the shoes of the former as to the share which would come to Kedarnath upon a partition; and that the Court, if that position were established, would itself, at Jainarayan's instance, decree a partition as between the plaintiffs on the one hand and Kedarnath on the other. Their Lordships think that on the present pleadings it is open to Jainarayan to set up such a case, but express no opinion as to its validity either in law or fact.

Under these circumstances, their Lordships being of opinion that they cannot, on the materials before them, finally determine the rights of the parties, will humbly advise His Majesty to set aside the judgments and decrees appealed from, and remand the suit for trial, with a declaration that it is competent for the Court, in the event of the respondent Jainarayan failing in his other defences, to make the whole or any part of the relief granted to the plaintiffs conditional on their assenting to a partition so far as regards Kedarnath's interest in the estate, so as to give effect to any right to which the respondent may be entitled claiming through Kedarnath.

The respondents must pay the costs of the hearing on the preliminary issues in the District Court, and the costs of the appeal to the Judicial Commissioner, but there will be no order as to the costs of this appeal.

Edward Dalgado.—Solicitor for the Appellants.

T. L. Wilson & Co..—Solicitors for the Respondents, Jainarayan and his alienee.

J. M. P.

Appeal allowed : case remanded.

P. O.

1913.

Ramkishore

v.

Jainarayan.

Sir Samuel Griffith.

APPELLATE CIVIL.

*Before Sir Francis Maclean, K. C. J. E., Chief Justice,
Mr. Justice Banerjee and Mr. Justice Harington.*

GURU DAS KUNDU CHOWDHRY AND OTHERS

CIVIL.

1900.

July, 11, 12, & 13.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Land acquisition—Compensation—Back land—Injurious affecting—Land Acquisition Act (I of 1894), Sec. 23 Sub-sec. (4)—Acquisition for certain purpose, if can be abandoned.

It is reasonable in seeking to fix the proportion of value between the back land and the frontage land, to consider how far the land stands back from the road.

The principle laid down in *Krao v. The Acton Local Board* (1) is applicable to India regarding injurious affection to land.

A public body which has acquired land in this country for one specific purpose, may not subsequently abandon that purpose and use the land so acquired for some other purpose for which they have not acquired it.

Per Banerjee J.—The rent realised from the land is not the sole basis for determining the market value. The market value of any land is to be determined not necessarily according to its present disposition, but laid out in the most lucrative and advantageous way in which the owner can dispose of it.

If, by reason of the declaration, the land, if offered for sale, would have fetched less, the land was injuriously affected notwithstanding that there was no actual diminution of the rent.

Appeal by the Plaintiffs.

The appellants were awarded certain compensation in land acquisition proceedings.

The material facts and arguments are set out in the judgment.

Mr. Allen, Babus Baidya Nath Dutt and Monmohan Dutt for the Appellants.

Babus Ram Churn Mitra and Sris Chunder Chowdhry for the Respondent.

The judgments of the Court were as follows :

Maclean C. J.—This is a land acquisition case in which the claimant is the appellant. The Collector awarded him, including the fifteen per cent. statutory allowance, a sum of Rs. 24,783-6-4. The District Judge confirmed the view of the Collector; and ordered the present appellant to pay the costs of the proceedings before him. Hence the present appeal.

* Appeal from Original Decree No. 294 of 1898, against the decree of O. P. Casperis Esq., District Judge of 24 Parganahs, dated the 17th May, 1898.

(1) (1889) 14 App. Cas. 163.

July, 13.

The claimant appeals on three different matters. *First*, he says, that the sum awarded for the land actually taken is insufficient, having regard to its true market value; *secondly*, he contends that, as the Municipality have only taken a portion of his land, and intend to use the portion they have so taken for the purpose of erecting thereon a sewage discharge depot, his adjoining lands will be injuriously affected, and he claims compensation for such injurious affection; *thirdly*, and *lastly*, he says he is entitled to compensation for severance. I will deal with the three points in the order in which I have mentioned them.

As to the market value of the land I do not propose to again lay down the principles upon which cases of this class proceed—I had occasion in a previous Land Acquisition case, my judgment in which for some reason or other has been included in the present paper book, and which is dated the 18th of June 1897, to go fully into the principle upon which this Court acts in these matters, principles which have not been disputed before us to-day, and I need not repeat what I then said.

The land in this case is situated in a locality more or less familiar to most of us. It is a plot of land aggregating in the whole some three bighas and seven cottahs, or thereabouts, and it lies about 200 feet to the west of the Russapugla Road, which is a continuation of the Chowringhee Road, and connected with it by a *bashi* road of some fifteen feet in width. The Russapugla Road is admittedly a wide street, with a wide foot-path on each side, and is a very important thoroughfare. The land claimed is partially bounded on the south by a road known as the Pepulpatti Road which is also a wide and important thoroughfare. The Municipality have taken a narrow strip of land running for nearly three hundred feet from the Pepulpatti Road up to the land upon which they propose to erect their sewage depot, and which land roughly is about two hundred feet square. The claimant is also the owner of all the land bounded on the south by the Pepulpatti Road from Russapugla Road to Bidyapara Road on the west, and this includes a Bazar at the corner of Russa and Pepulpatti Roads and known as Porabazar. The situation of the land in question is not very far from the Lower Circular Road which bounds the maidan on the south, and is in reasonable propinquity to the hospitals and other pucca buildings shown upon Exhibit 20.

CIVIL.

1900.

Guru Das

v.
The Secretary of
State for India in
Council.

Macleod, C. J.

CIVIL

1900.

Guru Das

The Secretary of
State for India in
Council.

Maclean, C. J.

I have stated generally the situation of the land: it is accurately shown on the various plans proved in the case. The claimant urges that here is a plot of land with access to two good roads, that it is a valuable site—a site, which, having regard to the manner in which Calcutta is extending in that direction, is likely to be required, in no very long time, for the erection of *pucca* buildings, for residential purposes. At present, admittedly, it is *busti* land, and I will accept the view of the Municipality that it is occupied at present by a poor and low class of people. That being the situation of the land, the question is, what is its true market value? I will deal first with the question of the frontage land. We have had presented to us, as is usual in these cases, an average of the prices realised at previous sales of land in the more or less immediate neighbourhood, but, for the reasons I have pointed out in the judgment I have referred to, averages at the best must not be regarded as absolutely reliable tests. We have been referred to a series of sales in the neighbourhood, sales mainly of land with frontages on the Pepulpatti Road, but lying in to the west of the Bidyapara Road—these sales show an average price of Rs. 700 per cottah.

These prices afford some guide to us, and the learned vakil who appears for the Municipality has done his best to reduce the average of Rs. 700 per cottah by directing each of the cases in the list before us. He has gone so far as to say that only one of the instances, the one in which the value is put at Rs. 615 a cottah, ought to be accepted—I am not disposed to accept this view.

The learned District Judge has put the value of the frontage land taken—I am speaking now only of the frontage land—at Rs. 600 a cottah, and he has reduced it from Rs. 700 to Rs. 600 per cottah, because he says that there is a great distinction between the land on the western side of Bidyapara Road and that on the eastern side, by reason of the circumstance, that the land on the western side has been greatly improved by the erection of *pucca* buildings upon it, whereas the land on the eastern side still remains *busti* land. I scarcely think that the materials are sufficient to warrant this somewhat arbitrary reduction, and, upon the evidence before us, I think Rs. 700 per cottah for the land of the Pepulpatti road is a fair and reasonable value to place upon this frontage land.

I now pass from the frontage land to the back land which

aggregates about three bighas, five cottah and fifteen chittack. The District Judge has valued that at half the value he placed upon the frontage land, that is to say, at Rs. 300 per cottah. It is difficult to lay down in these cases any hard and fast rule as to what is the relative proportion of value as between the back land and the frontage land, but it is at least reasonable in seeking to fix that proportion to bear in mind how far the land stands back from the road. Here the land has the advantage of being near two important roads, and, upon the best consideration I am able to give to the matter, I am not disposed to quarrel with the view of the Court below that, seeing the distance from these roads, one-half of the value of the frontage land, would be a fair value for the back land. This would be Rs. 350 per cottah. I do not think that the Municipality can reasonably quarrel with this conclusion, especially having regard to the instance upon which they rely, the instance shown in Exhibit 3 and which relates to the plot of land numbered 5 in Exhibit 23, which fetched Rs. 500 a cottah for the back land whilst the front land fetched Rs. 1,200 a cottah. No doubt in that instance the back land was only thirty feet from the road, whilst, in the present case, the distance from the roads,—but there are two roads—is 200 and 288 feet. For this back land, adopting the view of the lower Court that the value should be placed at one half that of the frontage land, the value must be placed at Rs. 350 per cottah.

Now I come to the question of injurious affection, and I think I am doing no injustice to the argument of the learned senior Government pleader, when I say, he will correct me if I am wrong,—that although there is a slight distinction in the language of the English Land Clauses Act in the section relating to injurious affection as compared with the language of section 23, sub-section 4 of the Land Acquisition Act of this country, he felt that he could not successfully contend, as a matter of law, that the principle laid down in the case of *Essex v. The Acton Local Board* (1) and other similar cases in the Courts of England, was not applicable to the case now before us. In my opinion, that principle is applicable: otherwise it would be difficult to see to what class of cases section 23, of the Land Acquisition Act can properly apply.

Upon this part of the case, I am unfortunately unable to appreciate or follow the reasoning of the learned Judge in the

CIVIL
1900.
Guru Das
The Secretary of
State for India in
Council.
Maclean, C. J.

CIVIL.

1900.

Guru Das

The Secretary of
State for India in
Council.

Maslow, C. J.

Court below, nor has any attempt been made by the learned Government pleader to support the view of the law as laid down by the learned District Judge.

That being so, the question is, what ought the claimant to receive in respect of this injurious affection.

It is not, I admit, a very easy matter upon which to arrive at a conclusion, especially upon the evidence as it stands in the present case. The evidence of the principle witness called by the claimant, speaking as an expert, is to the effect that the close proximity of this sewage depot to the other adjoining land of the claimant would depreciate its value by about fifty per cent. There can be no reasonable doubt that to put down a depot of this class in the very heart of a thickly populated *bustee*, must injuriously affect the value of the adjoining land.

Mr. Stevens who was called for the claimant, also as an expert witness, has put the depreciation in value at thirty-three per cent., and I do not find that these estimates are challenged by the evidence on the other side—I am however bound to say that the view put forward by these two witnesses strikes me as highly exaggerated. That a depot of this nature is calculated to prove exceedingly offensive to those who are living in the vicinity must be reasonably clear and there is force in the contention of the appellants that the propinquity of such a depot is likely to have a most injurious effect on the *bazar* to which I have referred.

The appellant may fairly say that the value of this land, as future building land for a good class of residential character,—and pucca-houses have already been built on the western side of the Bidyapara road,—would be most seriously affected by the existence of this depot in the very heart of his land.

This, I think, cannot reasonably be denied, and whilst, I admit, it is not an easy thing to assess the compensation on minute mathematical methods still, sitting here as Judges of fact and taking into consideration all the circumstances of the case, I think, if we award the claimants not the exaggerated amount which their witnesses speak to, but a sum calculated at fifteen per cent. of the value now found of the land, we shall be giving them an adequate and at the same time not an exaggerated compensation.

Then arises the question what area is likely to be affected by the offensive exhalation arising from this sewage depot. The expert witness Kanti Chunder Bannerjee said that, taking as

a centre the centre of the depot, it would extend over a radius of from 4 to 500 feet. Mr. Stevens said substantially the same thing. Mr. Le Patourel, a witness for the other side, said that for his own part he should not like to live within 200 feet of the depot. We have thus, upon the evidence, an area of something between 200 and 500 feet from the centre of the depot given as likely to be affected by the stink from it. I have no doubt the claimants' witnesses have overestimated the distance, and that Mr. Le Patourel has rather minimised it: in my opinion a fair and reasonable distance to fix would be an area covered by a radius of 300 feet taken from the centre point of the depot. We are told that the area thus covered would amount to about 160 cottahs. The evidence as to that is not very precise, and if it is disputed by the Municipality, the area must be ascertained, and after such ascertainment, the amount on this head, assessed as I have indicated, can be inserted in the decree. Probably the parties will be able to agree upon the area.

There is one argument, or I should rather say, suggestion thrown out by the Municipality which I am bound to mention in this connection. They say now, that they do not intend to use the land which they have thus acquired for a sewage discharge depot, that they have abandoned this intention, and that they are willing to have this expression of their present intention inserted in the decree, and, in this view, they say that the claimants are not entitled to any compensation for injurious affection. But I do not see how we can now go into that; we must look at the matter as it stood when the declaration was made by the Government to acquire the land for the purpose of erecting this depot. It is unnecessary to express any opinion as to whether a public body which has acquired land under the Land Acquisition Act in this country, for one specific purpose, can subsequently abandon that purpose, and use the land so acquired for some other purpose for which they have not acquired it. For my own part I should have thought it very questionable. But I think the present claimants are entitled to say, "We were brought here to meet the case of your acquiring this land for the purpose of using it as a sewage depot: and we are entitled to have our compensation assessed upon that footing. It is all very well for you now at this late stage to say you are not going to use it for a sewage depot, but for all we know you may be going to use it for something yet more offensive to us. We are entitled to treat the matter as it stood when you

CIVIL.
1900.
Guru Das
s.
The Secretary of
State for India in
Council,
Maclean, C. J.

CIVIL.

1900.

Guru Das

v.

The Secretary of
State for India in
Council;

Maulan, A. J.

made your declaration,—and that is the only footing upon which it can properly be dealt with."

I do not think we can now go into this matter.

One other question remains, the question of compensation for severance. A reference to the plans in the case will show that the claimants' land is nearly cut in half by the action of the Municipality.

There is no precise evidence on this point, though it is reasonably clear that if the claimants, hereafter sell or let their land for building purposes, the severance is calculated to depreciate such selling and letting value.

It is true as I have said that there is no distinct evidence before us on this point, but the whole case is before us, and on this head, it rather speaks for itself, and, sitting here, as Judges of fact, I cannot say as actual jurymen,—there is, I think, sufficient upon the admitted facts of the case to justify us in saying that the claimants must sustain some loss by this severance and that they are entitled to some reasonable compensation for such loss, and taking as I admit, a rather rough and ready view of the matter upon the materials before us,—and there are certain elements upon this head which are in themselves patent,—I think that the sum of Rs. 1,000 would be a fair amount to award.

I have now dealt with the various contentions. The order of the Court below must be discharged, and it will be a very easy matter to adjust the figures and insert them in the decree of this Court, in accordance with the terms of this judgment. This must be done. The claimants are entitled to their costs in the lower Court, and in this Court: the costs of this appeal will be in proportion to the success or failure of the appeal.

Banerjee J.—I am of the same opinion. I only wish to add a few words on the second point raised in the appeal, namely, that the Court below ought to have allowed compensation under clause 4, section 23 of the Land Acquisition Act. That clause provides that the Court in determining the amount of compensation to be awarded shall take into consideration the damage, if any, sustained by the person interested at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his other property movable or immovable or his earnings. Though the language of this clause is slightly different from that of the corresponding provision of the English statute, 8 and 9 Vic. 18 Ss. 49 and 63, that does not

make the principle laid down in the case of *Comper Essex v. The Acton Land Board* (1), wholly inapplicable to the present case as the learned Judge in the Court below seems to have thought. It is true that the appellants are entitled to compensation only for the damage sustained at the time of the Collector's taking possession of the land; and as the time of the Collector's taking possession of the land must under the provisions of section 16 of the Land Acquisition Act be preceded by his award which again must be preceded by a declaration of the intended acquisition under section 6, stating the purpose for which the land is acquired, and as the announcement of a purpose like the one for which the land in question was acquired must in my opinion, injuriously affect the value of such land, the claimants clearly bring their case within clause 4 of section 23. For upon such announcement being made the market value of the land must have been reduced, and if the owners wanted to sell the land at the time the land would have been sure to fetch less than its former value. The learned senior Government pleader contended that as it was not shown that any of the tenants left the land upon the announcement or declaration being published, or that the rent which the proprietors were realising had been reduced, we must hold that no damage is shown to have been sustained by the claimants at the time of the Collector's taking possession of the land. This contention is in my opinion unsound, because the law does not make the rent realised from the land the sole basis for determining the market value. On the contrary it has been held in several cases of which I need only refer to *Premchand Bural v. The Collector of Calcutta* (2) and *In the matter of the Land Acquisition Act X of 1870, Munji Khetsey* (3) that the market value of any land should be determined not necessarily according to its present disposition, "but laid out in the most lucrative and advantageous way in which the owner can dispose of it." If by reason of the declaration, the land if offered for sale would have fetched less, it must be held notwithstanding that there was no actual diminution of the rent that the land had been injuriously affected.

Harington J.—I agree with the judgments which have been delivered and do not propose to add anything.

A. T. M.

Appeal allowed in part.

(1) (1889) I. R. 14 App. Cas. 153.
(2) (1876) I. L. R. 2 Calo. 168. (3) (1890) I. L. R. 15 Bom. 270.

ORVIL.
1000.
Guru Das
r.
The Secretary of
State for India in
Council.
Banarjee. J.

*Before Sir Asutosh Mookerjee, Knight, Judge,
and Mr. Justice Beachcroft.*

FAKIR CHANDRA SINHA RAY

v.

BANAMALI SAIN.*

CIVIL.

1913.

March, 11.

Ejectment—Invalid sub-lease by raiyat—Sub-lease, if an encumbrance—Bengal Tenancy Act (VIII of 1885), Secs. 85, 161 (a).

A sub-lease registered in contravention of section 85, sub-section (2) of the Bengal Tenancy Act is not operative against the superior landlord of an occupancy raiyat.

Manik v. Bani (1) distinguished.

An under-raiyat, who came into the land in contravention of the statute without the consent of the superior landlord, cannot hold any sub-tenancy which may be treated as an encumbrance within the meaning of clause (a) of section 161 of the Bengal Tenancy Act, as against the superior landlord auction-purchaser. The landlord auction-purchaser cannot, accordingly, be called upon to annul this sub-tenancy as an encumbrance.

The term 'any sub-tenancy' in clause (a) of section 161 of the Bengal Tenancy Act is, by itself, comprehensive enough to include the interest of an under-raiyat.

Appeal by the Plaintiffs.

Suit for ejectment.

The disputed land was originally held under the plaintiffs by A who came into occupation in 1883. On the 2nd October, 1888, A executed a permanent sub-lease in favour of the defendant, whose occupation of the land had commenced from sometime before. The document was registered without objection. The property ultimately devolved on B who made default in payment of rent to the plaintiffs. The latter, as the superior landlords, thereupon obtained a decree for arrears of rent, and in execution thereof the tenancy was brought to sale and purchased by the plaintiffs themselves on the 14th February 1907. The sale was confirmed on the 21st March following, and symbolical possession was delivered to the plaintiffs as purchasers on the 8th June 1907. The plaintiffs not getting actual possession, caused a notice to be served upon him as required by section 167 of the Bengal Tenancy Act. Notwithstanding the service of notice, the defendant refused to vacate the land. The Court of first instance decreed the suit; but that decree was reversed on appeal.

* Appeal from Appellate Decree No. 1152 of 1911, against the decree of Babu Bankim Chandra Mitra, Subordinate Judge of Bardwan, dated the 9th February, 1911, reversing that of Babu Purna Chandra Bose, Munsiff of Kalna, dated the 8th December, 1909.

Babus Dwarka Nath Chakravarty (for *Babu Joges Chandra Roy*) and *Sitaram Banerjee* for the Appellant.

Babu Sajani Kant Sinha for the Respondent.

The judgment of the Court was delivered by

CIVIL.

1918.

Fakir Chandra
a.
Banamall Saini.

March, 11.

Mookerjee J.—This is an appeal on behalf of the plaintiffs in an action in ejectment. The land in dispute was originally held under the plaintiffs by one Bhuban Mandal who came into occupation in 1883. On the 2nd October 1888, Bhuban Mandal executed a permanent sub-lease in favour of the defendant, whose occupation of the land had commenced from sometime before. This lease was granted on the assumption that Bhuban Mandal was a tenure-holder. The document was consequently registered without objection. The property ultimately devolved on one Bhabini Dasi who made default in payment of rent to the plaintiffs. The latter, as the superior landlords, thereupon obtained a decree for arrears of rent, and in execution thereof the tenancy was brought to sale and purchased by the plaintiffs themselves on the 14th February 1907. The sale was confirmed on the 21st March following, and symbolical possession was delivered to the plaintiffs as purchasers on the 8th June 1907. The plaintiffs were, however, unable to obtain actual possession, as the defendant was in occupation. They thereupon caused a notice to be served upon him as required by section 167 of the Bengal Tenancy Act. Notwithstanding the service of notice, the defendant refused to vacate the land. The plaintiffs thereupon commenced this suit on the 12th March 1909 to eject the defendant on the ground that his interest, if any, had been validly terminated, and he was consequently liable to be ejected as a trespasser. The Court of first instance decreed the suit. Upon appeal, that decree has been reversed by the Subordinate Judge. The Courts below have concurrently found that the tenancy held by Bhuban Mandal constituted an occupancy holding. It is clear therefore that the sub-lease granted by Bhuban Mandal to the defendant on the 2nd October 1888 should not have been admitted to registration in view of the provisions of sub-section (2) of section 85 of the Bengal Tenancy Act. In fact, as the instrument purported to be a permanent sub-lease, it would not have been admitted to registration but for the fact that the land demised was described as comprised in a permanent tenure. It follows accordingly that the sub-lease so registered in contravention of the statute is not operative. This view is supported by the decision in *Farip Khan v. Dorfa Bewa* (1). It is plain

CIVIL.

1918.

Kakir Chandra

Banamali Sain.

Mookerjee, J.

that the question which was raised in the case of *Manik Borai v. Bani Charan Mandal* (1), namely, whether a sub-lease registered in contravention of the statute is operative as between the lessor and the lessee, does not consequently arise in the present case. Judicial opinion is unanimous to the effect that a sub-lease registered in contravention of the provisions of section 85 (2) of the Bengal Tenancy Act, is not operative against the superior landlord of the occupancy raiyat. We must, therefore, determine the rights of the parties on the footing that the defendant did not acquire any title under the sub-lease of the 2nd October 1888.

As already stated, he was in occupation from before the 2nd October 1888; his status, from the commencement of his tenancy, was accordingly that of an under-raiyat. The question is, whether he has a sub-tenancy which is required to be annulled by the purchaser under clause (a) of section 161 of the Bengal Tenancy Act. Now section 159 provides that where a holding is sold in execution of a decree for arrears of rent due in respect thereof, the purchaser shall take it subject to the interests defined as protected interests, but with power to annul those defined as encumbrances. It is argued on behalf of the defendant that he has an interest which falls within the description of protected interest as also of an incumbrance. This contention requires consideration, because the Courts below have found that the notice under section 167 of the Bengal Tenancy Act was not served upon the defendant in accordance with law. If the notice had been served upon him, it would have become needless to consider, whether he held a sub-tenancy which had to be annulled as an encumbrance within the meaning of section 161; but it would have been necessary to determine whether he had a protected interest within the meaning of section 160.

Now in so far as section 161 is concerned, the case for the defendant is that he is an under-raiyat, independently of the invalid sub-lease of the 2nd October 1888, and that he has consequently a sub-tenancy within the meaning of section 161 (a). It may be conceded that the term any sub-tenancy, is, by itself, comprehensive enough to include the interest of an under-raiyat. But the question arises, whether there is a sub-tenancy in so far as the plaintiffs are concerned, because the plaintiffs are not only purchasers at the sale in execution of the decree for arrears of rent, they are also the superior landlords

in respect of the occupancy holding which was brought to sale. Section 85 sub-section (1) provides that if a raiyat sub-lets otherwise than by a registered instrument, the sub-lease shall not be valid as against the landlord, unless made with his consent. It has not yet been investigated, whether the plaintiffs as landlords of the occupancy holding consented to the grant of the sub-lease to the defendant as an under-raiyat. But we shall assume, for the purposes of argument, that such consent was not given. If, then, the defendant was inducted upon the land as an under-raiyat without the consent of the landlords of the occupancy raiyats, it is plain that there is no sub-lease in his favour which is valid against the superior landlords. Consequently, he does not hold any sub-tenancy which may be treated as an encumbrance within the meaning of clause (a) of section 161 as against the landlord auction-purchaser. The landlord auction-purchaser cannot, accordingly, be called upon to annul this sub-tenancy as an encumbrance. The view we take is in accord with that taken by this Court in the case of *Peary Mohun Mookerjee v. Badul Chandra Bagdi* (1). We do not pronounce any opinion upon a question, which may hereafter arise, namely, as to the precise position of a stranger who purchases at a sale held in execution of a decree for arrears of rent. As regards the case now before us, it is sufficient to observe that section 161 clearly is of no assistance to the defendant, if it is assumed that his interest as under-raiyat was created without the consent of the landlord.

CIVIL.

1918.

Fakir Chaudhary
v.
Banamali Saib.
Mookerjee, J.

In so far as section 160 is concerned, reliance is placed by the defendant on clause (c) by which protection is afforded to any lease of land whereon dwelling-houses, manufactories or other permanent buildings have been erected or permanent gardens, plantations, tanks, canals, places of worship or burning or burying grounds have been made. Here, again, precisely the same question arises as in the case of section 161. It cannot be reasonably contended that the defendant has a lease of land within the meaning of clause (c), section 160, when as against the plaintiffs such lease is not valid because not shown to have been made with their consent. Here, too, we reserve the question which may possibly hereafter arise as to the position of a stranger purchaser. But it is obvious that section 160 also is of no assistance to the defendant.

(1) (1900) I. L. B. 28 Cal. 205.

CIVIL

1913.

Fakir Chandra
v.
Banamali Sain.

Mookerjee J.

It finally becomes necessary to determine, whether sub-section (1) of section 85 applies to this case. The Courts below have not determined whether the land was sublet to the defendant with the consent of the superior landlords of the occupancy raiyat. The determination of that question was unnecessary in view of the frame of the suit. The plaintiffs, as already explained, sought to eject the defendant on the ground that his interest had been annulled in accordance with the provisions of section 167 of the Bengal Tenancy Act. That case has failed. Consequently the point just mentioned must be investigated. The learned vakil for the defendant has also contended that even if clause (c) of section 160 be held inapplicable, the defendant may still be able to establish that the plaintiffs are estopped, by reason of their conduct, from seeking relief by way of ejectment, and he has explained that the question of estoppel was not pointedly raised in view of the frame of the suit. We are of opinion that, in these circumstances, the question of estoppel should be investigated.

The result is that this appeal is allowed, the decrees of the Courts below set aside and the case remanded to the Court of first instance in order that the Court may determine upon evidence to be adduced by the parties the following questions; namely, *first*, whether the defendant was granted a tenancy as an under-raiyat with the consent of the landlord of his grantor, the occupancy raiyat; and *secondly*, whether the claim for ejectment is barred by the doctrine of estoppel. If it is found upon the first question that the sub-lease to the defendant was granted with the consent of the plaintiffs or their predecessors, or, if it is found upon the second question that the plaintiffs are estopped by reason of their conduct, the suit will stand dismissed. If both the questions are decided against the defendant, the suit will stand decreed. Each party will pay his own costs in all the Courts up to the present stage.

A. T. M.

Appeal allowed: case remanded.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Mullick.*

ASKAR ALI

v.

GOPI MOHON ROY CHOWDHURY.*

*Ejectment—Transfer of a portion of non-transferable holding—Surrender—
Bengal Tenancy Act (VIII of 1885), Sec. 86.*

As long as the tenancy subsists, the landlord is not entitled to eject the transferee of a portion of the holding.

Okandra Mohan v. Biswasnagar (1), *Durga Prasad v. Doula Gazeo* (2) and *Kabil Sardar v. Chander Nath* (3) referred to

Gagan v. Alak Chandra (4) distinguished.

Quere.—Whether a purchaser of a portion of a holding is protected under Sub-section (A) of section 86 of the Bengal Tenancy Act?

Tamizuddin v. Khoda Nawaz (5) doubted.

Whether there can be a surrender effective for the purpose of section 86 of the Bengal Tenancy Act, when the condition mentioned in Sub-section (5) cannot be fulfilled.

Appeal by the second Defendant.

Suit for ejectment.

It was alleged by the plaintiff that the tenant, after unlawfully transferring a portion of the holding to the contesting defendants, surrendered the holding in his favour. The Court of first instance found that the surrender was fictitious and dismissed the suit. On appeal that decree was reversed.

Babu Gobind Chandra Dey Roy for the Appellant.

Babus Harendra Narayan Mitra and *Upendra Kumar Roy* for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the second defendant in an action in ejectment. The subject-matter of the litigation consists of nine parcels of land which, the plaintiff alleges, are comprised in a tenancy held by the thirteenth defendant under him. The case for the plaintiff is that in 1903 the tenant unlawfully transferred a portion of the holding to the contesting defendants, that thereafter, on the 27th May 1908, the tenant surrendered the holding in his favour, and, that consequently, he is entitled to recover possession thereof. The Court of first

* Appeal from Appellate Decree No. 3653 of 1911, against the decree of Babu Satkari Haldar, Subordinate Judge of Tipperah, dated the 5th December, 1910, reversing that of Babu Madhu Sudan Roy, Munsiff of Nabinagar, dated the 18th December, 1909.

(1) (1892) 1 C. W. N. 158.

(3) (1892) 1 L. R. 20 Calo. 590

(2) (1894) 1 C. W. N. 160

(4) (1913) 17 C. W. N. 698.

(5) (1909) 11 C. L. J. 16, 14 C. W. N. 299.

CIVIL

1913.

June, 5.

June, 5.

CIVIL

1918.

Askar Ali

Gopi Mohon.

Mookerjee, J.

instance found with regard to two of the plots, namely, the first and the third, that they were not included in the tenancy of the thirteenth defendant. As regards the surrender, the Court found that it was fictitious, as notwithstanding the execution of the deed of release, the tenant had continued in occupation of the remainder of the land. In this view, the Court of first instance dismissed the suit. Upon appeal, that decree has been reversed by the Subordinate Judge. On the question of the genuineness of the surrender, the finding of the Subordinate Judge is ambiguous. He states that even if the deed be collusive and intended to cheat the transferee, the latter has his remedy against the transferor. In the opinion of the Subordinate Judge the plaintiff is entitled to re-enter, even though there has been no real surrender in his favour. The second defendant has now appealed to this Court, and on his behalf the decree of the Subordinate Judge has been assailed on two grounds, namely, *first*, that the plaintiff cannot succeed inasmuch as there is no real surrender in his favour and *secondly*, that the plaintiff is not entitled to re-enter because even if the surrender represents a real transaction, it does not affect the interest or prejudice the position of the transferee.

In so far as the first point is concerned, it is plain that the Subordinate Judge has not reversed the clear finding of the Court of first instance. That Court found that notwithstanding the execution of the deed of surrender on the 27th of May 1908, the tenant has continued in occupation of the homestead and a portion of the remaining land of the tenancy. That finding is not displaced by the Subordinate Judge. On the other hand, the Subordinate Judge holds that the tenant, notwithstanding the execution of the deed of release, has continued in occupation with the permission of the landlord. In our opinion, there is no room for doubt that the alleged surrender was collusive. It has been argued, however, that even if the surrender was collusive, the plaintiff is entitled to re-enter. We are of opinion that there is no foundation for this contention. If the surrender was collusive, the tenancy of the thirteenth defendant has not yet terminated, and, so long as that tenancy subsists, the plaintiff is not entitled to eject the transferee. It has been ruled in a series of cases in this Court, amongst which may be mentioned those of *Chandra Mohun Mookhopadhyaya v. Bissesswar Chatterjee* (1),

Durga Prosad Sen v. Dowla Gasse (1), and *Kabil Sardar v. Chunder Nath Nag Chowdhry* (2) that as long as the tenancy subsists, the landlord is not entitled to eject the transferee of a portion of the holding. The first ground must consequently succeed.

In so far as the second ground is concerned, reliance has been placed by the respondent upon the case of *Tomisuddin Khan v. Khoda Nawaz Khan* (3) to show that a purchaser of a portion of a holding is not protected under sub-section (6) of section 86 of the Bengal tenancy Act. In the view we take of the rights of the parties with reference to the first question raised before us, it is not necessary to decide whether the case of *Tomisuddin Khan v. Khoda Nawaz Khan* (3) furnishes a correct exposition of the law. We may point out, however, with regard to that decision that there are at least four points which require consideration. In the first place, the learned Judges adopted, for the purposes of the interpretation of section 86 which finds a place in Chap. IX of the Bengal Tenancy Act, the definition of the term "incumbrance" given for the purposes of Chap. XIV alone. In the second place, the decision of this Court in the case of *Chundra Sakai v. Kalli Prosanno Chuckerbutty* (4) shows that an exchange is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act, and, in relation to the question raised before us, there does not appear to be any real distinction between an exchange and a sale. In the third place, the effect of the decision is to place the purchaser in a worse position than a mortgagee or lessee under sub-section (6) of section 86. In the fourth place, it may be a question, whether there can be a surrender effective for the purposes of section 86 when the conditions mentioned in sub-section (5) cannot be fulfilled. But, as we have already said, it is not necessary for us to determine, whether the case of *Tomisuddin Khan v. Khoda Nawaz Khan* (3) was correctly decided, and we reserve our opinion upon the question involved in that litigation.

It has finally been urged that the case of *Gagan Chandra Choudhry v. Alak Chand Saha* (5) assists the contention of the respondent. That case, however, is clearly distinguishable. There, it was ruled, upon the authority of the earlier decisions in *Badan Chandra Das v. Rajeswari Debya* (6) and *Rajendra Kishore Adhikari v. Chandra Nath Dutt* (7), that where there

CIVIL.

1918.

Askar Ali

v.

Gopi Mohan.

Mookerjee, J.

(1) (1894) 1 O. W. N. 180.

(2) (1892) 1 L. B. 20 Calo. 580.

(3) (1909) 11 O. L. J. 16; 14 O. W. N. 229.

(4) (1895) 1 L. B. 23 Calo. 254.

(5) (1918) 17 O. W. N. 698.

(6) (1905) 3 O. L. J. 570.

(7) (1907) 12 O. W. N. 878.

CIVIL.
1918.
Askar Ali
v.
Gopi Mohon.
Mookerjee, J.

has been a surrender of a part of a holding by a tenant, the landlord is entitled to re-enter, even though he is aware that there is some one else in possession claiming under a title derived from the tenant. But it has been overlooked by the learned vakil for the respondent that in *Gagan Chandra Choudhury v. Alak Chand Saha* (1) there was no incumbrance secured by a registered instrument within the meaning of sub-section (6) of section 86.

The result is that this appeal is allowed, the decree of the lower appellate Court set aside and that of the Court of first instance restored. This order will carry costs, both here and in the Court of appeal below.

A. T. M.

Appeal allowed.

(1) (1918) 17 C. W. N. 698.

*Before Sir Asutosh Mookerjee, Knight, Judge,
and Mr. Justice Beachcroft.*

HIMAT KHAN AND ANOTHER

v.

SHER KHAN.*

CIVIL.
1918.
May, 6, 7.

Civil Procedure Code (Act V of 1908), Secs. 99, 102—Misjoinder—Decision in favour of plaintiff—Account, suit for—Second appeal.

The effect of section 99 of the Code of Civil Procedure is that when the Court of first instance decides the question of misjoinder in favour of the plaintiff, there is an end of the matter and the defendant is precluded from raising the question in appeal.

A second appeal from a decree passed in a suit for account is not barred by section 102 of the Code of Civil Procedure.

Appeal by the Plaintiffs.

Suit for accounts and for recovery of village profits.

The plaintiffs claimed to be *gaontias* in respect of a fourth share in the village, while the defendant was a *lambardar*. The Court of first instance decreed the suit on the merits. Upon appeal the suit was dismissed on the ground that it was not properly framed and that the plaint was open to objection on the ground of misjoinder of parties and causes of action.

Babu Harendra Krishna Mukherjee for the Appellants.

Babus Sarat Chandra Roy Chowdhury and Gobind Chandra Chakraverty for the Respondent.

* Appeal from Appellate Decree No. 8208 of 1911, against the decision of Babu Probha Chandra Sinha, Subordinate Judge of Sambalpur, dated the 30th August, 1911, reversing that of Babu Gagan Behari Chowdhury, Munsiff of Sambalpur, dated the 30th April, 1911.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the plaintiffs in a suit for accounts and for recovery of village profits. The plaintiffs claim to be *gaontias* in respect of a fourth share in the village, while the defendant is alleged to be a *lambardar*. The plaintiffs contend that the defendant as *lambardar* is bound to collect all sorts of village profits and to render an account thereof to the plaintiffs. The Court of first instance decreed the suit on the merits. Upon appeal the Subordinate Judge has dismissed the suit on the ground that it has not been properly framed and that the plaint is open to objection on the ground of misjoinder of parties and causes of action. The plaintiffs have now appealed to this Court.

CIVIL.

1913.

Himat Khan
v.
Sher Khan.

May, 7.

A preliminary objection has been taken to the hearing of the appeal on the ground that it is barred under section 102 of the Code of Civil Procedure, 1908, inasmuch as the value of the suit is less than Rs. 500. This objection must be overruled, because under Art. 31 of the schedule to the Provincial Small Cause Courts Act, a suit for accounts is excluded from the jurisdiction of the Small Cause Court. The appeal is consequently competent.

It is plain that the decree of the Subordinate Judge cannot be supported, in view of the provisions of section 99 of the Civil Procedure Code of 1908. That section provides that no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of any misjoinder of parties or causes of action. The effect of section 99 is that when the Court of first instance decides, as in the case before us, the question of misjoinder in favour of the plaintiff, there is an end of the matter, and the defendant is precluded from raising the question in appeal.

It was consequently not competent to the Subordinate Judge to dismiss the suit on the ground of multifariousness.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him in order that the appeal may be heard on the merits. The appellants are entitled to their costs of this appeal.

A. T. M.

Appeal allowed : case remanded.

Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Mullick.

AKHIL CHANDRA BISWAS

v.

HUSAIN ALI SOWDAGAR.*

CIVIL

1918.

June, 4.

Under-raiyat, if raised to raiyat—Purchase of superior tenure by occupancy raiyat—Bengal Tenancy Act (VIII of 1885), Sec. 22(b), before amendment—Under-raiyat interest, if transferable.

The effect of a purchase by an occupancy raiyat of a superior permanent tenure, under section 22(b) of the Bengal Tenancy Act as framed in 1885, is to vest the holding in the purchaser, subject to the limitation that the occupancy right ceases to exist and an under-raiyat is not raised to the status of a raiyat but continues to be an under-raiyat.

An interest of an under-raiyat is not *ipso facto* transferable. An under-raiyat may under certain circumstances acquire a right of occupancy, and if he so acquires it, his right is transferable.

Appeal by Defendant No. 1.

Suit for ejectment.

The disputed parcel was held by the second defendant as an under-raiyat. The plaintiff was originally an occupancy raiyat. In 1886, he purchased the superior tenure. In 1901 the second defendant transferred his interest in the land to the first defendant. The present action was commenced in 1909 to eject the first defendant as a trespasser. The Courts below concurrently decreed the suit.

Babu Dhirendra Lal Kastgir for the Appellant.

Babu Khitis Chandra Sen for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the first defendant in an action in ejectment. The subject-matter of the litigation is a parcel of land which, according to the plaintiff, was held by the second defendant as an under-raiyat. The plaintiff was originally an occupancy raiyat. In 1886, he purchased the superior tenure. In 1901 the second defendant transferred his interest in the land to the first defendant. The present action was commenced in 1909 to eject the first defendant as a trespasser. The Courts below have concurrently decreed the suit. On the present appeal, that decree has been assailed on three grounds.

It has been contended in the first place that the effect of the purchase by the plaintiff of the superior tenure in 1886, was

* Appeal from Appellate Decree No. 891 of 1911, against the decree of Babu Tarak Chunder Das, Subordinate Judge of Chittagong, dated the 4th January, 1911, confirming that of Babu Nagendra Kumar Bose, Munsiff of South Raojan, dated the 28th November, 1909.

CIVIL.

1918.

Akhl Chandra

v.

Husain Ali.

Mookerjee, J.

to elevate the status of the second defendant. This contention is obviously unfounded. The effect of the purchase must be determined with reference to the terms of section 22(b) of the Bengal Tenancy Act as framed in 1885. That sub-section provides that when the immediate landlord of an occupancy holding is a proprietor or a permanent tenure-holder, and the entire interest of the landlord and the raiyat becomes united in the same person by transfer, succession, or otherwise, the occupancy right shall cease to exist; but nothing in the sub-section shall prejudicially affect the rights of any third person. It has not been proved that the superior interest purchased by the plaintiff was a permanent tenure. But we shall assume for our present purpose that it was a permanent tenure. What then was the effect of the purchase? The result was to vest the holding in the purchaser, subject to the limitation that the occupancy right ceased to exist. But it has been argued for the appellant that the effect in substance was that the holding itself ceased to exist. This contention is opposed to the decision of this Court in the case of *Jawadul Huq v. Ram Das Sahu* (1) affirmed in *Ram Mohan v. Kachhu* (2). That case turned upon the construction of sub-section 2 of section 22 of the Bengal Tenancy Act, and is an authority for the proposition that where a proprietor purchases an occupancy holding, the holding does not cease to exist, but merely the occupancy right, which is one of the incidents of the holding, disappears. A comparison of the phraseology of sub-section (2) with that of sub-section (1), shows that in sub-section (1) a distinction is made between "occupancy holding" and "occupancy right," and we are not prepared to accede to the contention of the appellant that when the occupancy right ceases to exist, the holding also vanishes. In our opinion, the true effect of the purchase by the plaintiff was to keep the holding in suspense. In this view, the defendant continued to be an under-raiyat.

It has been contended, in the second place, that the suit is barred by limitation. This argument has clearly no force, because, if the defendant is a trespasser, he is liable to be ejected by the plaintiff within the period of 12 years prescribed by Art. 142 of the Indian Limitation Act.

It has been contended, in the third place, that the provisions of the Bengal Tenancy Act, in so far as they apply to the ejectment of under-raiyats, have not been followed. This argument

(1) (1896) I. L. R. 24 Cal. 143. (2) (1903) I. L. R. 32 Cal. 386.

CIVIL.

1918.

Akhil Chandra

v.

Husain Ali.

Mookerjee, J.

involves the obvious fallacy that the first defendant is an under-raiyat. But the case for the plaintiff is that the interest of the second defendant was non-transferable and that the first defendant has not acquired any interest in the holding by his purchase. It has been suggested, however, by the defendant that as there is no provision in the Bengal Tenancy Act which bars the transfer of the interest of an under-raiyat, that interest must be deemed transferable. We are clearly of opinion that the provisions of the Bengal Tenancy Act do not support this view. They show that the Legislature contemplated that an under-raiyat may under certain circumstances acquire an occupancy-right. If he does acquire such a right, that right may be transferable by custom or local usage. But there is no authority for the proposition that the interest of an under-raiyat is *ipso facto* transferable.

The result is that this appeal is dismissed with costs.

A. T. M.

Appeal dismissed.

*Before Sir Cecil Brett, Knight, Judge, and
Mr. Justice Sharfuddin.*

RAMDHANI SHA

v.

TOPI BIBI AND OTHERS.*

CIVIL.

1912.

May, 17, 20, 21.

Appeal—Order setting aside execution sale—Execution proceedings fraudulent and collusive—Decree-holder purchaser—Civil Procedure Code (Act V of 1908), Sec. 47—Evidence Act (I of 1872), Sec. 41.

An application for execution of a mortgage decree was made more than three years after the decree was made absolute. After the decree absolute was made and before the said application, the judgment-debtor transferred his equity of redemption to A. The mortgagors, judgment-debtors, though served with notice, did not put in appearance nor made any objection to the application. The mortgaged property was put up to sale and purchased by the decree-holder. The sale was confirmed and possession given to the purchaser. Shortly after the delivery of possession, an application for setting aside the sale was made by A on the ground that the decree could not be executed as it was satisfied, that the execution of the decree was barred, and that the execution proceedings were irregular and had been carried on by fraud and collusion between the mortgagors judgment-debtors and the decree-holder. The Court of first instance dismissed the application for setting aside the sale in so far as it raised the question of limitation and fixed a time for the disposal of the rest of the case. On appeal the lower appellate Court set aside the decision and remanded the case :

* Appeal from Order No. 847 of 1911 with Rule No. 4887 of 1911, against the order of Babu Bidhu Bhusan Banerjee, Subordinate Judge, 2nd Court of Hughly, dated the 23rd June, 1911, reversing the order of Babu D. Ghosh, Munsiff, 2nd Court at Serampore, dated the 4th March, 1911 and remanding the case to the lower Court with certain directions.

Held, that an appeal lay to the High Court against the order of remand as the application for setting aside the sale came under section 47 of the Code of Civil Procedure.

Held also, that an appeal lay to the lower appellate Court under section 47 of the Code of Civil Procedure against an order dismissing the application on the ground of limitation by the first Court. †

Mungul Pershad Doshi v. Grija Kant Lalari (1) distinguished.

Held further, that it was quite competent to the applicant under the provisions of section 44 of the Evidence Act to raise the questions and adduce evidence to prove the facts stated.

Appeal by the Decree-holder.

The material facts and arguments are stated in the judgment.

Babus Mohendra Nath Roy and Hira Lal Sanyal for the Appellant.

Babus Umakali Mukherjee and Hatendra Krishna Mukherjee for the Respondent.

C. A. V.

The judgment of the Court was delivered by

Brett J.—This is an appeal against an order passed by the Subordinate Judge of Hughli setting aside an order made by the Munsiff of Serampore in certain execution proceedings and remanding the case for further hearing to the Court of first instance.

May, 21.

A preliminary objection has been taken to the competency of the appeal on the ground that no appeal lies against an order directing a remand. In this case, however, the question which has to be determined on the merits is whether or not the original application was one coming under the provisions of section 47 of the Code of Civil Procedure. Clearly, if the original application came under that section, there would be a second appeal from the decision of the lower appellate Court to this Court. From the facts stated in the arguments it appears that the present appellant obtained a mortgage decree on the 17th September 1903 against one Mangal Bhor. An order absolute for sale was passed on the 24th July 1904. Thereafter, nothing was done to execute the decree until September 1909 when the present appellant the decree-holder put in an application for execution filing with the same a document which purported to be a letter acknowledging the debt signed by Sijal Bhor, the eldest son of

† See *Raja Ramaswar Proshad v. Rai Shan Krimon* (1901) 8 O. W. N. 257 (261-2), and *Chandambala Dobi v. Probodh Chandra* (1906) 9 O. L. J. 251 (257), I. L. R. 36 Cal. 422—Rep.

(1) (1881) I. L. R. 8 Cal. 51; L. R. 8 I. A. 123; 11 O. L. R. 118.

CIVIL

1912.

Ramdhani Sha
v.
Topi Bibi.

CIVIL.

1912.

Ramghani Sha

v.

Topi Bibi.

Brett, J.

Mangal Bhor, the original decree-holder (who had died) on his own behalf and by the mother and guardian of Gonesh Bhor, the youngest son of Mangal Bhor, who was then a minor. On the 24th September 1909 the Court directed the issue of notices to the judgment-debtors to show cause why the decree should not be executed, which notices appear to have been served on the 8th October 1909. The judgment-debtors did not put in appearance and, on the 7th December 1909, the Court executing the decree passed an order that the execution proceedings should go on. The mortgaged properties were afterwards put up to sale and were purchased by the decree-holder on the 18th February 1910. The sale was confirmed on the 30th March 1910 and possession was given on the 24th September 1910. The application out of which the present appeal arises was made on the 28th September 1910 with the object of having the sale set aside. The grounds stated in support of the application were that the decree had been satisfied before the sale, that the execution of the decree was barred before the sale was held and, therefore, the sale was void or voidable, that the proceedings bearing up to the sale were irregular and that they had been carried on by fraud and collusion between the judgment-debtors and the decree-holder. The application was put in by the opposite party who are the transferees of the mortgaged properties under conveyances dated the 5th November 1906 and the 16th July 1907 executed in their favour by the heirs of the original mortgagor. The case that was put forward in support of the application was that the whole of the proceedings in execution were fraudulent, that, in fact, the decree had been satisfied and that the sale was held in order to defraud the applicants of the property which they had purchased from the heirs of the mortgagor.

The Court of first instance held that the applicants were not entitled to make the application as the matters raised in the application were *res judicata* between the decree-holder and the judgment-debtor in consequence of the order passed by the executing Court on the 7th December 1909. It was argued that, as the applicants were assignees of the heirs of the original judgment-debtor, they were bound by the acts of those heirs and that, as those heirs of the original judgment-debtor had failed after service of the notice had been made on them on the 8th October 1909 to appear and object to the execution proceedings and had allowed the order of the 7th December 1909 to be passed, that order decided the matter finally so far as the decree-holder

and judgment-debtors were concerned and that the applicants were not entitled to reopen the question again. In support of the contention of the decree-holder reliance was placed on the case of *Mungul Pershad Dichit v. Grija Kant Lahiri* (1). The Court of first instance dismissed the application in so far as it raised the question of limitation and fixed the 18th March 1911 for the disposal of the rest of the case. There was an appeal to the lower appellate Court and that Court set aside the decision of the Court of first instance on the point raised as to whether the applicants were barred from raising in the present application the question whether the decree was barred by limitation. It accordingly ordered that the application should be sent back to the Court of first instance with directions to allow the parties to adduce evidence on the question of limitation and after deciding that point to proceed to deal with the application.

The decree-holder has appealed to this Court, and the question which we have, first, to determine in order to deal with the objection as to the competency of the appeal is, whether or not the application made by the opposite party in September 1909 was one under the provisions of section 47 of the new Code of Civil Procedure. In our opinion, the lower appellate Court was right in the view which it took that the application was one under the provisions of section 47 of the Code of Civil Procedure; that being the case, an appeal lies to this Court against the order of the lower appellate Court. The preliminary objection, therefore, fails.

In support of the appeal, it has been urged that the order of the lower appellate Court should be set aside on the ground that no appeal lay to that Court against the order of the Court of first instance, which, it is argued, amounted to a partial decision of the matters raised in the application and not to a final disposal of the matter. The learned pleader for the appellant has contended on the authority of the case of *Behary Lal Pundit v. Kedar Nath Mullick* (2), that the lower appellate Court had no authority to deal with the order of the Court of first instance as that order only determined a point arising incidentally in the course of the proceedings for determining the rights of the parties seeking relief and was not a decree within the meaning of section 2 of the Code of Civil Procedure. In our opinion, this contention cannot prevail. The object of the application in the Court of first instance was to have the execution proceedings

CIVIL,
1912.
Ramdhani Sha
Topi Bibi.
Brett J.

(1) (1831) 1. L. R. 8 Calc. 51. (2) (1891) 1. L. R. 18 Calc. 469.

CIVIL,
1912.
Ramdhani Sha
s.
Topi. Bibl.
Bratt J.

dismissed on the ground that they were barred by limitation. The contention advanced on behalf of the applicants was that the letter of acknowledgment which was filed with the application made in September 1909 by the decree-holder was a fraudulent document and was concocted by the decree-holder in collusion with the heirs of the original judgment-debtor in order to defraud the applicants of their rights. It must be borne in mind that the original mortgage decree was passed on the 17th September 1903 and made absolute on the 24th July 1904, that the sales to the applicants were made on the 5th November 1906 and the 16th July 1907 and that it was not till September 1909 that the application for execution with the letter of acknowledgment attached to it was made to the Court. If the Court of first instance had decided in favour of the applicants on the point of limitation the question whether the execution would proceed or not would have been finally determined and, in those circumstances, we think there can be no doubt that the application was one which fell within the provisions of section 47 of the Code of Civil Procedure. The learned Subordinate Judge in setting aside the order of the Court of first instance, held that that Court had erred in holding that the decision in the case of *Mungul Pershad Dichit v. Grija Kant Lahiri* (1) had application to the facts of the present case. In the present case, the interests of the applicants and of the judgment-debtors, if the case of the applicants be true, were certainly not identical. The applicants' case was that, though they derived interest in the property through the judgment-debtors they were being fraudulently deprived of their rights by collusion between the judgment-debtors and the decree-holder by which the decree-holder was attempting to execute the decree which had been barred by limitation or had been satisfied. We think that the view which the lower appellate Court took in the matter is correct and that the decision relied on by the Court of first instance has no application to the present case and that that Court erred in holding that there was any bar in the way of the present applicants' making their application to have the execution proceedings dismissed on the grounds mentioned in that application. We are also of opinion that it was quite competent to the applicants under the provisions of section 44 of the Evidence Act to raise the questions and adduce evidence to prove the facts stated in their application. In our opinion

(1) (1881) I. L. R. 8 Calo. 51.

therefore the present appeal must fail. The appellant has not been able to support his contention that the order of the Court of first instance was one against which no appeal lay to the lower appellate Court and he has also failed to establish before us that the order passed by the lower appellate Court in setting aside the order of the Court of first instance was incorrect. In our opinion, the learned Judge of the lower appellate Court was perfectly right in the view which he took that the applicants were entitled to raise the question of limitation and to have that question tried by the Court of first instance in the execution proceedings. The result, therefore, is that the appeal is dismissed. Costs will abide the result of the final decision. We assess the hearing fee in this Court at three gold mohurs.

No. 4416 : The Rule stands discharged but without costs.

A. T. M.

Appeal dismissed : Rule discharged.

*Before Sir Asutosh Mookerjee, Knight, Judge,
and Mr. Justice Beachcroft.*

MATI SHEIKH

v.

BAIKANTHA NATH KAR.*

Consideration—Mortgage bond—Settlement of dispute—Promise to pay time-barred debt—Contract Act (IX of 1872), Sec. 25 sub-Sec (3).

A mortgage bond executed in settlement of a substantial dispute between the parties, viz., whether an application for execution of decree for money was or was not barred by limitation, is executed for consideration. Even if the execution of the said decree was barred at the time of the settlement and the mortgagor was not aware of it, the mortgage is valid under sub-section (3) of section 25 of the Indian Contract Act.

Ramaswami v. Kuppaswami (1) dissented from.

Appeal by the Defendant.

Suit to enforce a mortgage security. The defence was that there was no consideration for the mortgage. The plaintiff held a decree for money against the defendant and applied for execution. Objection was taken by the officers of the Court that the application was *prima facie* barred by limitation. The plaintiff decree-holder was then called upon to shew cause why the application should not be dismissed. There were, at this stage, negotiations between the plaintiff and the defendant, and the

* Appeal from Appellate Decree No. 1267 of 1911, against the decree of Mr. Jogendra Nath Mookerjee, District Judge of Bankura, dated 16th February, 1911, confirming that of Babu Debendra Prasad Bagchi, Munsiff of Bishenpur, dated the 31st January, 1910.

CIVIL.

1912.

Ramdhani Sha

Topi Bibi

Brati J.

CIVIL.

1918.

May, 7.

CIVIL.

1918.

Mati Sheikh
v.
Balkantha Nath.

latter executed the mortgage in suit for satisfaction of the mortgage debt. Thereafter, cause was not shown by the plaintiff decree-holder in the execution proceedings, with the result that the application was dismissed. The plaintiff then sought to enforce the security.

Babu Bejoy Kumar Bhattacharjee for the Appellant.

Babus Mohendra Nath Roy and *Sarat Chandra Dutt* for the Respondent.

The judgment of the Court was delivered by

May, 7.

Mookerjee J.—This is an appeal by the defendant in a suit to enforce a mortgage security executed on the 27th August 1908. The defendant resisted the claim on the ground that there was no consideration for the mortgage. The circumstances under which the bond was executed are not in dispute. The plaintiff held a decree for money against the defendant, and applied for execution. Objection was taken by the officers of the Court that the application was *prima facie* barred by limitation. The plaintiff decree-holder was then called upon to show cause why the application should not be dismissed. There were at this stage negotiations between the plaintiff and the defendant, and the latter executed the mortgage bond in suit, for satisfaction of the judgment-debt. Thereafter cause was not shown by the plaintiff decree-holder in the execution proceedings, with the result that the application was dismissed. The plaintiff now seeks to enforce the security. The defendant resists the claim on the ground that as the application for execution was barred by limitation, there was no subsisting debt for the satisfaction of which the mortgage could be executed, so as to impose any legal liability on the mortgagor. In our opinion, there is no substance in this contention.

In the first place, it is fairly clear from the facts stated that there was a substantial dispute between the parties, as to whether the application for execution was or was not barred by limitation. The mortgage-bond was executed in settlement of that dispute. Consequently, there was ample consideration for the mortgage. In the second place, even if it be assumed that the execution was barred by limitation, it is clear that the case is governed by sub-section (3) of section 25 of the Indian Contract Act, which provides that an agreement made without consideration is void, unless it is a promise made in writing and signed by the person to be charged therewith to pay wholly or in part a debt of which the creditor might have enforced payment, but for the law for the limitation of suits. There is no room for

controversy that we have here a promise to pay a debt. It is contended on behalf of the mortgagor that the debt was one of which the creditor could not have enforced payment by reason of the law for the limitation of suits. Consequently, the promise to pay the debt, is precisely of the character contemplated by the section. It has been argued, however, that a promise falls within sub-section 3 of section 25 only when it is a promise made with consciousness on the part of the promisor that the debt is barred, and that there is nothing in the present case to show that the mortgagor, when he executed the mortgage-bond, was aware that the application for execution was barred by limitation. We are not prepared to accept this view of the law as well-founded, notwithstanding the *dictum* in *Ramaswami Pillai v. Kuppuswami Pillai* (1). We are invited by the appellant to hold in substance that section 25 sub-section (3) provides that an agreement made without consideration is void unless it is a promise to pay a barred debt with knowledge that it is so barred. This is not what the legislature has said, and we cannot import into the section words which are not to be found there. We hold accordingly that there was ample consideration for the mortgage.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs. In view of the nature of the defence taken, we assess the hearing fee at ten gold mohurs.

A. T. M.

Appeal dismissed.

(1) (1910) 20 M. L. J. 656.

Before Sir Asutosh Mookerjee, Knight, Judge, and

Mr. Justice Mullick.

BUDAYAR RAHMAN

v.

KARAM ALI.*

Taluk—Permanent tenure—Purchaser of portion—Rent suit—Purchaser not made party, & affected.

If there be nothing, either in the surrounding circumstances or in the instrument itself which creates the interest, to show that it was intended to be otherwise, the inference is, that the tenancy called a *taluk* constitutes a permanent tenure.

* Appeal from Appellate Decree No. 8310 of 1910, against the decree of Babu Tarak Chandra Das, Subordinate Judge of Chittagong, dated the 23rd July 1910, confirming that of Baba Siroj Mohan Das Gupta, Magistrate of Hathazari, dated the 5th November, 1909.

CIVIL.

1918.

Mati Sheikh

Balkantha Nath.

Mookerjee J.

CIVIL.

1918.

June, 5.

CIVIL.

1918.

Budayar Rahman

v.
Karam Ali.*Krishna v. Moor Sufdar* (1) referred to.

A landlord is not at liberty to ignore a purchaser of a portion of a tenure and prejudice his position by a decree made in a suit to which he had not been joined as a party.

Chamatkari v. Triguna (2), *Sham Chand v. Brojonath* (3) and *Kall Kumar v. Biddu Bhushan* (4) referred to.

Ramroy v. Rupai Pramanick (5) distinguished.

Appeal by Defendant No. 1.

Suit for a declaration that the plaintiff's title has not been affected by a sale held in execution of an *ex parte* decree for arrears of rent and also for confirmation of possession.

The disputed property was a *taluk* held by A under the first party defendant. A transferred in 1892 to the plaintiff a portion of his interest in the land. The deed was registered and the landlord's fee was paid as prescribed by the Bengal Tenancy Act. The landlord subsequently brought a suit for rent against A alone, obtained an *ex parte* decree, and in execution thereof, put up the property to sale. The appellant became the purchaser at that sale. His contention was that he purchased the entire tenure inasmuch as the decree for rent had been obtained against the registered tenant.

Babu Jyotish Chandra Sarkar for the Appellant.

Babu Mohendra Nath Roy for the Respondent.

The judgment of the Court was delivered by

June, 5.

Mookerjee J.—This is an appeal by the first defendant in a suit in which the plaintiff seeks for a declaration that his title has not been affected by a sale held in execution of an *ex parte* decree for arrears of rent on the 16th November 1904 and also asks for confirmation of possession. The property in dispute is a *taluk* originally held by one Fazlar Rahaman under the first party defendants. On the 4th February 1892 and the 9th March 1892, Fazlar Rahaman transferred to the plaintiff, a portion of his interest in the land. The deeds were registered and the landlord's fee was paid as prescribed by the Bengal Tenancy Act. The landlord subsequently brought a suit for rent against Fazlar Rahaman alone, obtained an *ex parte* decree, and in execution thereof, put up the property to sale. The appellant became the purchaser at that sale. His contention is that he purchased the entire tenure inasmuch as the decree for rent had been obtained against the registered tenant. This argument did not find favour

(1) (1874) 23 W. R. 336.

(8) (1878) 21 W. R. 94; 12 B. L. R. 484.

(9) (1918) 17 O. W. N. 833.

(4) (1911) 18 O. L. J. 89.

(5) (1906) 8 O. L. J. 267.

with the Subordinate Judge, and his decision is consequently challenged before us. Reliance is placed upon the case of *Gagan Saeikh v. Abejan Khatun* (1) to show that when a decree for rent has been obtained against the registered tenant, the purchaser acquires an indefeasible title as against an unregistered transferee of the tenancy. This proposition, however, has no application to the circumstances of the present case, because the subject matter of this litigation is a permanent tenure. But it has been argued that the land is described as a *taluk*, and that there is no evidence to show that the *taluk* constitutes a permanent tenure. In our opinion, there is no substance in this contention. It was pointed out by this Court in *Khaja Asanoollah v. Kalse Mohun Mookerjee* (2) and *Krishno Chunder Goopto v. Meer Sufdur Ali* (3) that the word '*taluk*' imports a permanent tenure. Mr. Justice Markby observed in the case last mentioned that if there be nothing, either in the surrounding circumstances or in the instrument itself which creates the interest, to show that it was intended to be otherwise, the inference is that the tenancy called a *taluk* constitutes a permanent tenure. In the case before us, as already stated, there is no evidence to rebut the presumption. It was open to the appellant, when the case was remanded, to prove that the tenancy was not a permanent tenure, and this he might have established by proof either that the tenancy was not heritable or that it was held for a limited term. He has adduced no evidence on either of these points. If then the tenure was permanent what is the true position of the parties? The landlord has obtained a decree for arrears of rent against one only of the entire body of tenants. A sale held in execution of such a decree cannot possibly affect the interest of persons who have not been joined as defendants. This is conclusively established by a long series of judicial decisions amongst which may be mentioned *Sham Chand v. Brojonath* (4) and *Kali Kumar Ghose v. Bidhu Bhusan Banerji* (5). It has been contended, however, that a contrary view was taken in the case of *Rammoyi Dasi v. Rupai Pramanick*. (6) But that case is clearly distinguishable. There, in answer to a suit for arrears of rent, the defendant pleaded that a part of the tenancy had been transferred to a person who had not been joined as a defendant. He further asserted that inasmuch as the tenure was transferable and a part of it had been

CIVIL.

1918.

Budayar Rahman

v.

Karam Ali,

Mookerjee J.

(1) (1911) 14 O. L. J. 180.

(4) (1878) 31 W. R. 94; 12 B. L. R. 484.

(2) (1872) 18 W. R. 469.

(5) (1911) 18 O. L. J. 89.

(3) (1874) 22 W. R. 326

(6) (1903) 18 O. L. J. 237.

CIVIL,

1918.

Budayar Rahman

Karam Ali.

Mookerjee J.

validly transferred, he as well as the transferee should be held separately and individually responsible only for proportionate shares of the rent. This contention was negatived, because under section 88 of the Bengal Tenancy Act, the landlord is not bound to recognise a sub-division of the tenancy, though he may be bound to recognize the transferee of a portion of the tenure as a joint-tenant. This plainly does not justify the conclusion that the landlord is at liberty to ignore the purchaser of a portion of the tenure and prejudice his position by a decree made in a suit to which he has not been joined as a party : *Chamatkari v. Triguna* (1).

The result is that the decree of the Court below, (whereby the title of the plaintiff is declared not to have been affected by the execution sale held on the 10th November 1904, and his possession is confirmed,) is affirmed and this appeal dismissed with Costs.

A. T. M.

Appeal dismissed.

(1) (1918) 17 O. W. N. 838.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

BUDHU KOER AND OTHERS

v.

HAFIZ HUSAIN AND OTHERS.*

CIVIL,

1918.

April, 27, 28.

Dispossession—Bengal Tenancy Act (VIII of 1886 as amended by Act I. B. O. of 1907), Sch. III, Art 3—Cause of action, accrual of, before amendment—Adverse possession—Limitation Act (IX of 1908) Sch. I, Art 142—Ideal possession.

The law of limitation applicable to a suit is *prima facie* the law in force at the date of the institution of the suit. But there may be circumstances connected with a new statute which furnish an indication that the Legislature did not intend to affect retrospectively existing causes of action; one of these circumstances is that the new law was brought into immediate operation without any opportunity afforded to litigants to enforce their rights under the old law.

Lala Sont Ram v. Kanhaiya Lal (1) and *Bishnagar v. Jasoda Lal* (2) referred to.

Article 3, Schedule III of the Bengal Tenancy Act, as amended by Act I (B. O) of 1907, does not apply to cases where the dispossession took place before the amending Act came into operation.

Munjaboori Bibi v. Akel Mahomed (3) followed.

As against the rightful owner, the possession of a trespasser is available only when there is actual possession of the disputed land or overt

* Appeal from Appellate Decree No. 3252 of 1910, against the decree of J. C. Twidell, Esq., District Judge of Bhagalpur, dated the 31st March, 1910, modifying that of Babu Hem Obandra Mookerjee, Subordinate Judge of Monghyr, dated the 26th August, 1909.

(1) (1918) 17 O. L. J. 488; I. L. R. 85 All. 227; L. R. 40 L. A. 74.

(2) (1918) 17 O. W. N. 622. (3) (1918) 17 O. L. J. 316.

or physical act of ownership done upon it. The true owner is not affected by ideal possession of the land or possession which exists only in the imagination of the parties.

Secretary of State v. Krishnaswami (1), *Clark v. Elphinstone* (2) and *Mirza Shamsur v. Kunj Behari* (3) referred to.

Appeal by the Defendants.

Suit for declaration of title to land and for recovery of possession thereof.

The plaintiffs claimed the disputed land as included in their *mukarari* tenure and alleged that the defendants had taken wrongful possession of it. The Courts below concurrently found in favour of the plaintiffs upon the question of title. On behalf of the appellants it was argued that the suit was barred by Art. 3 of Schedule III of the Bengal Tenancy Act and also under Art. 142 of Schedule I of the Limitation Act.

Babu Kulwant Sahay (for *Babu Gones Dutt Singh*) for the Appellants.

Moulvi Muhammad Mustafa Khan and *Muhammad Tahir* for the Respondents.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the defendants in a suit for declaration of title to land and for recovery of possession thereof. The plaintiffs claim the disputed land as included in their *mukarari* tenure and allege that the defendants have taken wrongful possession of it. The Courts below have concurrently found in favour of the plaintiffs upon the question of title. It has been argued before us that the Courts have erroneously held that the interest of the plaintiffs is that of a *mukararidar*. In our opinion, there is no foundation for this contention. The Courts have found upon the evidence that the plaintiffs have a *mukarari* right and that finding cannot be disturbed in second appeal. The only substantial question in controversy in the appeal is, whether or not the claim is barred by limitation. On behalf of the appellants, it has been argued that the suit is barred under Art. 3 of Schedule III of the Bengal Tenancy Act and also under Art. 142 of Schedule II of the Limitation Act.

In so far as the first branch of this contention is concerned, it has been argued that the plaintiffs are rayaits and that the suit which was instituted on the 14th September, 1908, is governed by Art. 3 as amended by Act I of 1907 (B. C.). The Article as amended provides that a suit to recover possession of land

CIVIL

1918.

Budhu Koer

v.

Hafiz Hussain.

April, 22.

(1) (1902) 1, L. B. 29 Cal. 518; L. B. 29 I. A. 104.

(2) (1880) 8 App. Cas. 161.

(3) (1907) 7 O. L. J. 414 (423). 12 O. W. N. 278.

CIVIL.

1913.

Budha Koer
 v.
 Haffa Husain
 Mookorjee J.

claimed by the plaintiff as a raiyat or an under-raiyat must be brought within two years from the date of dispossession. The plaintiffs respondents do not admit that they are raiyats; on the other hand, they assert that they are tenure-holders. But even if it be conceded that the plaintiffs are raiyats as alleged by the defendants, the Article in its amended form cannot possibly apply. No doubt, as pointed out by their Lordships of the Judicial Committee in *Lala Soni Ram v. Kanhaiya Lal* (1), the law of limitation applicable to a suit, is, *prima facie*, the law in force at the date of the institution of the suit. But, there may be circumstances connected with a new statute which furnish an indication that the Legislature did not intend to affect retroactively existing causes of action; one of these circumstances is, as pointed out in *Bisheswar v. Jasoda Lal* (2), that the new law was brought into immediate operation without any opportunity afforded to litigants to enforce their rights under the old law. On this principle, it was recently held in the case of *Munjihoori Bibi v. Akel Mahmud* (3), that Article 3, as amended, cannot be held to apply to cases where the dispossession took place before the amending Act came into operation. The first branch of the argument consequently fails.

As regards the second branch of the argument, we observe that the Courts below have found that the plaintiffs were in occupation up to 1892 when the land was diluviated. The land began to reform in 1893 but did not become fit for cultivation till 1897. The defendants granted leases to their sub-tenants on the 27th May, 1896; but it has been found that the lands could not be actually occupied and cultivated till the 22nd September, 1907. The position, therefore, is that the plaintiffs were in occupation up to the time of submergence of the land and, in view of the decision of the Judicial Committee in the case of *Secretary of State v. Krishnamoni Gupta* (4), they must also be deemed to have been in occupation so long as the land remained submerged. But it has been argued that adverse possession must be deemed to have commenced before the land was actually fit for occupation and cultivation. In our opinion, there is no force in this contention. As was pointed out by Lord Davey in the case just mentioned, in order to sustain a claim to land by limitation under the Indian Limitation Act, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him. In other words, as stated by their Lordships of

(1) (1913) L. B. 40 I. A. 74.

(2) (1913) 17 O. W. N. 632.

(3) (1913) 17 O. L. J. 316; 17 O. W. N. 889.

(4) (1902) I. L. B. 29 Cal. 518; L. B. 29 I. A. 104.

the Judicial Committee in the case of *Clark v. Elphinstone* (1), as against the rightful owner the possession of a trespasser is available, only when there is actual possession of the disputed land, or overt or physical act of ownership done upon it. The true owner is not affected by ideal possession of the land or possession which exists only in the imagination of the parties: *Mirza Shamsker Bahadur v. Kunj Behari Lall* (2). Mere assertion of a hostile title by the defendants on the 27th May, 1896, did not consequently affect the possession of the plaintiffs. The second branch of the argument consequently fails.

The result is that the view taken by the District Judge that the defendants have not been in adverse possession for more than twelve years must be upheld, and his decree affirmed with costs.

A. T. M.

Appeal dismissed.

(1) (1880) 6 App. Cas. 164.

(2) (1907) 7 O. L. J. 414 (423); 12 O. W. N. 278.

Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, Sir Richard Harington, Bart, Judge, and Sir Asutosh Mookerjee, Knight, Judge.

BHAGWAT BUKSH ROY

v.

SHEO PERSHAD SAHU AND OTHERS.*

Jagir—Grant, if conditional—Tenure created by document—Construction—Presumption—Contract with qualification made with other persons, admissibility of.

A *jagir* is not necessarily conditional; it may be unconditional as when it is a grant for services already rendered.

When a tenure is created by a document, the terms on which the land is held, its alienability and its liability to forfeiture, depend on the terms of the particular grant, and not on the terms of grants that may have been made to others.

* Where the question is whether A made a contract with B subject to a certain qualification, evidence of the fact that he made contracts with other persons subject to the same qualification, is inadmissible.

The element of a different personality is so important in affecting the making or the terms of a contract that the likelihood of making a similar contract with different persons is very much smaller when a contract is sought to be evidenced by other contracts with different persons than even in the case

* Letters Patent Appeal No. 2 of 1909 from a decision of Mr. Justice Richardson, differing from Mr. Justice Doss, dated the 8th May, 1909, in Appeal from Original Decree No. 345 of 1906, against the decree of S. B. Hignell, Esq., Subordinate Judge and Deputy Commissioner of Palamou, dated the 18th August, 1906.

CIVIL

1918.

Budhu Koer

v.
Hafiz Hussain.

Mookerjee J.

CIVIL

1918.

February, 3, 4, 5,
March, 18.

CIVIL.

1918.

Bhagwat Boksh

v.

Sheo Prahad.

where a contract is sought to be evidenced by other contracts with the same person

If it is proved by long uninterrupted usage that the lands have passed from ancestor to heir, that is, from father to son, for two or three generations without objection, the inference would be that the grant was a grant of inheritance, because the fact of descent from father to son is the strongest possible evidence of its hereditary character.

Kooldeo Narain v. Mahadeo Singh (1) followed.

Obiter—When service can no longer be enforced and the tenure consequently ceases to be a service tenure, the land can be alienated. When an estate is freed from the burden of service, the reason for the preservation of the estate as inalienable, disappears; alienation can be prohibited only with a view to prevent the permanent severance of the estate from the services annexed to it.

Appeal by the Plaintiff.

Suit for ejectment.

Tappa Taraia in the District of Palamow, in which two Mouzas Kanda and Toli are situate, was received by a former ancestor of the plaintiff, who was a junior member of the then Maharaja of Palamow, as a *khorphosh jagir* or maintenance grant. The case of the plaintiff was that Gajraj Roy, one of his ancestors, granted to the ancestor of Dhukbhanjan Manjhi and Baly Manjhi, who lived in Kanda, the two mouzas in suit on condition of their paying an annual rent of Rs. 19, and of rendering service, such service being the performance of Ghatwali service at Kanda Ghat and afterwards when the duty of patrolling the ghat or pass was brought under the direct management of Government and Police officers were appointed for that purpose, such service consisted of doing duty as a guard at the plaintiff's residence; that the *jagir* was inalienable and was liable to resumption on failure to perform the service; and that the Manjhis had transferred the two mouzas to the defendants; and that they had also ceased to perform the service. On those grounds, the plaintiff asked for possession and mesne profits.

The defendants Nos. 1 to 3 were the purchasers of the entire 16 annas of Mouza Kanda, and of 15 annas of mouza Toli under *kobalas*, executed by the Manjhis, at different periods between 1880 and 1899, each being for a small fractional share of one mouza or the other or of both, and also at execution sales, held during that time. The defendant No. 4 was the purchaser of the remaining 1 anna of mouza Toli. They pleaded that the suit was barred by limitation; that it was also barred by the principle of *res judicata* by reason of the judgments in a previous suit brought by the plaintiff's father against the Manjhis in the

(1) (1886) 6 W. B. 199; B. L. R. Sup. Vol. 559.

year 1867, and they averred that the two mouzas were granted to Ghanesam Manjhi, a remote ancestor of Dhukbhanjan Manjhi and Baly Manjhi a long time since, as a permanent, hereditary and transferable tenure which, they stated, had, for want of an adequate equivalent expression in the vernacular, been called *mourasi jagir*, that the original grantee Ghanesam Manjhi made the mouzabs arable and habitable by cutting and clearing the jungle, and hence the tenure was also called *khunt-katti* or *khut-katti* tenure, and that no condition of service was attached to the grant.

The first Court overruled the plea of limitation but gave effect to the plea of *res judicata*. As to the nature of the tenure it held that the two mouzabs did not form a service tenure, and that the story that it was so, was entirely a new one. It therefore dismissed the plaintiff's suit. An appeal by the plaintiff to the High Court was heard by Mr. Justice Doss and Mr. Justice Richardson who delivered the following judgments :—

Doss J.—This appeal arises out of an action to recover possession of two Mouzas Kanda and Toli, situated in Tappa Taraia, in the District of Palamow, on the ground that the defendants are in possession thereof without any valid title.

Tappa Taraia was received by a former ancestor of the plaintiff, who was a junior member of the then Maharaja of Palamow, as a *khorpash jagir* or maintenance grant. The case of the plaintiff is that Gajraj Roy, one of his ancestors, granted to the ancestor of Dhukbhanjan Manjhi and Baly Manjhi, who lived in Kanda, the two mouzas in suit on condition of their paying an annual rent of Rs. 19, and of rendering service, such service being the performance of Ghatwali service at Kanda Ghat, and afterwards when the duty of patrolling the ghat or pass was brought under the direct management of Government and Police officers were appointed for that purpose, such service consisted of doing duty as a guard at the plaintiff's residence; that the *jagir* is inalienable and is liable to resumption on failure to perform the service; that the Manjhis have transferred the two mouzas to the defendants; and that they have also ceased to perform the service. On these grounds, the plaintiff asked for possession and mesne profits.

The defendants Nos. 1, 2 and 3 are the purchasers of the entire 16 annas of Mouzah Kanda, and of 15 annas of Mouzah Toli under *kobalas*, executed by the Manjhis, at different periods between 1880 and 1899, each being for a small fractional share

CIVIL.

1918.

Bhagwat Baksh

Sheo Pershad.

1909.

May, J.

CIVIL

1918.

Bhagwat Buksh

v.
Sheo Pershad.

Doss, J.

of one mouza or the other or of both, and also at execution sales, held during that time. The defendant No. 4 is the purchaser of the remaining one anna of Mouzah Toli. They pleaded that the suit was barred by limitation; that it was also barred by the principle of *res judicata* by reason of the judgments in a previous suit brought by the plaintiff's father against the Manjhis in the year 1867, and they averred that the two mouzas were granted to Ghanesam Manjhi, a remote ancestor of Dhukbhanjan Manjhi and Baly Manjhi a long time since, as a permanent hereditary and transferable tenure which, they stated, had, for want of an adequate equivalent expression in the vernacular, been called *mourasi jagir*, that the original grantee Ghanesam Manjhi made the mouzas arable and habitable by cutting and clearing the jungle, and hence the tenure was also called *khunt-katti* or *khut-katti* tenure, and that no condition of service was attached to the grant.

The learned Subordinate Judge in a clear and exhaustive judgment has overruled the plea of limitation, but he has given effect to the plea of *res judicata*. As to the nature of the tenure he has, after a careful consideration of the oral and documentary evidence adduced in the case, summed up his conclusions in the following words: "The weight of this evidence certainly goes to show that the tenures in Palamow which are known as *jagirs* are, as a general rule, conditional on service, inalienable and liable to resumption on alienation and failure of service." He has, however, held that the tenure in suit is not identical in nature with those *jagirs* in which the custom prevails, because in his opinion the two mouzas did not form a service tenure, and that the story that it was, so, is entirely a new one. On these grounds, the learned Subordinate Judge has dismissed the plaintiff's suit.

The plaintiff has preferred this appeal.

I am unable to agree with the learned Subordinate Judge that the suit is barred by the principle of *res judicata*.

In the suit of 1867, the plaintiff's father sought to recover possession of the two mouzas on the ground that they had been granted to Rati Manjhi, Prayag Manjhi and Bodh Manjhi, the ancestors of Dhukbhanjan Manjhi, and others, as a *ticca* for life only, on condition of paying Rs. 19 as rent and other extra items and of "carrying out the orders according to zemindary practice," and that on the death of the last surviving grantee in Aswin, Sambat, 1915, the tenure came to an end. This Court, in second appeal, affirmed the decree of the Courts below and

dismissed the suit on the ground that the plaintiff had failed "to show that the title which he once admits to have been in the defendants' ancestors has expired."

The present suit is based on the ground that long after the litigation of 1867 had terminated, the Manjhis transferred, the mouzas to the defendants and ceased to perform the service incident to the tenure. I am unable to see how the judgments in the suit of 1867 can debar a suit which is founded on a cause of action which is alleged to have accrued subsequently, and indeed the learned Counsel for the respondent did not attempt to support this position. Of course, and this was conceded by the learned vakil for the appellant, these judgments would operate as *res judicata* in a subsequent suit to this extent that the plaintiff would be precluded from thereafter asserting that the tenure was one for life and capable of resumption on the death of the grantee, or in other words, that it was not heritable.

As regards the nature of the tenure, the oral and documentary evidence adduced on either side has been placed before us, and has been commented on at great length. The documentary evidence is divisible into two classes; *first*, judgments of Courts of justice and an extract from a letter, dated the 25th October, 1827, from the Acting Secretary to the Government of India to the address of the Board of Revenue, Central Provinces, by which the *superior khorposh jagirs* of the same category, as the *jagir* of the plaintiff's ancestor is, were held to be inalienable or recognised as such; *secondly*, judgments by which *subordinate service jagirs* granted by the *khorposh jagirdars* were held to be inalienable. The plaintiff's oral evidence proves several instances of resumption of service *jagirs* in Tappa Taraia, granted by his ancestors and he has also examined Roy Kishen Bux, Roy Bahadur, one of the biggest zamindars in Palamow, who himself is a *khorposhkar* of the Maharaja of Palamow. I agree with the learned Subordinate Judge that as to general custom in the district in the matter of *jagirs*, his evidence is entitled to much weight. He has stated that *jagirs* in Palamow are conditional on service, that they are not alienable, and in case of alienation are liable to resumption, and that he and his forefathers had made such resumptions. The evidence as to the custom of non-transferability of the superior *jagirs* or of the subordinate service *jagirs* is almost one-sided and is not contradicted by any evidence adduced by the defendants. They have failed to show by any rebutting evidence that the instances of resumption of

CIVIL.

1913.

Bhagwat Bux

v.

Sheo Parshad.

Doss, J.

CIVIL

1918.

Bhagwat Bukah

v.
Sheo Pernhad.

Doss, J.

service *jagirs* by the plaintiff and his ancestors deposed to by the plaintiff and his witnesses are unfounded. I therefore entirely agree with the learned Subordinate Judge that the service tenures in Palamow which are known as *jagirs* are, as a general rule, conditional on service, that they are inalienable and are liable to be resumed on alienation or failure of service.

It is urged on behalf of the respondents that the tenure is a *khunt-katti* tenure and not a *jagir*, that the Manjhis had at least as far back as the year 1867 set up that this was the real character of their tenure and that they have since repeated that assertion in the antecedent proceedings before the Revenue authorities. It is observable, however, that though the Manjhis asserted in the written statements, which they filed in the suit of the year 1867, that the two mouzas were made *khunt-katti* and *jungal tarashi*, (i. e. reclaimed by cutting and clearing the jungles) by their ancestors, they distinctly admitted that the tenure they had in those mouzas was a *jagir*, albeit, they added the qualification that it was a *jagir badfarsandun* (that is, a *jagir* descendible to heirs male), and indeed, in most of the receipts which Ram Sewak Sahu, father of defendants Nos. 1 and 2 and 3 obtained from the plaintiff's father and from the Sub-manager under the Encumbered Estates' Act. Dukhbhanjan Manjhi and Baly Manjhi are described as *jagirdars* and not *khunt-kattidars*, which, if the defendants' theory, that their *khunt-katti* was a tenure totally distinct from an ordinary *jagir*, were true, they ought to have been. The defendant No. 1, whose ancestor settled near Daltangang at some remote period and who is a *mahajan* and a zemindar, and is therefore expected to have some knowledge of the tenures in Palamow could not in his cross-examination say whether there was any other *khunt-katt* mouza in Palamow or not, and he added that in plaintiff's *tappa* there were other mouzas which are held in *jagir* and *mokurari*, thus drawing a sharp distinction between the two kinds of tenure and indicating thereby that *jagirs* do not possess the incidents of a *mokurari*. This evidence is significant and it renders the existence of this *khunt-katti* as the only *khunt-katti* in Palamow extremely doubtful.

The next question which remains to be considered is the most important, it is, whether assuming that the two mouzas formed the *jagir* tenure of the ancestors of the Manjhis, such tenure was in its inception conditional on certain services or not. I quite agree with the learned Subordinate Judge that

it is extremely improbable that after the signal success which the Manjhis achieved in the litigation with the plaintiff's father in the year 1867, they would render any service of a personal nature to the plaintiff's father, but at the same time it is admitted by the defendant No. 1 himself in his deposition that at Kanda, there has been Government Ghatwal station since the last 20 or 22 years, that near the ghat there are jungles and hills, and that the road from Palamow to Gaya, which is an old road and was constantly used when there were no railways, passes through this place and that even now it is the only road from Gaya to Palamow. It is also clear from the evidence that charges for the maintenance of the Ghatwals in Tappa Taraia used to be levied by Government from the plaintiff's father and are now levied from him. No doubt the defendant No. 1 says that he cannot state what the arrangement of the ghat was before the last 20 or 22 years, but there can hardly be any doubt that if the road from Palamow to Gaya passes through hills and jungles situated in mouza Kanda, that Government must, in early time, have imposed on the proprietors of these mouzahas the duty of maintaining guards for the safety of travellers passing through this dangerous locality and for the purpose of protecting them from thieves and robbers, nor indeed can there be any reasonable doubt that if these mouzas were granted to the ancestors of the Manjhis at a quit rent nearly the same in amount as the proportionate revenue attributable to these mouzas, as has been proved in this case, they were, it was so done in consideration of the grantees rendering that service, the performance of which was assigned to the proprietor himself by Government, namely the duty of patrolling Kandaghat. It has never been suggested by the Manjhis that these mouzahas were granted to their ancestors as a reward for some past services rendered by them. If then, the *jagir* in suit was originally created essentially with the object of making out of the income of those mouzas a provision for the maintenance of a patrol for Kandaghat, as I think it was, it follows that this duty must have been discharged by the Manjhis themselves or vicariously by paid servants until twenty or twenty-two years ago when Government relieved the proprietors of their responsibility for the safety of the ghats and took upon itself the duty of policing them by its own officers. This is proved by the plaintiff's evidence and is borne out by the evidence of the defendants' witness No. 2, Kharag Manjhi who distinctly admits. "We did some service to the Babu Sahib in

CIVIL.

1918.

Bhagwat Buxah

v.

Sheo Pershad.

Doss, J.

CIVIL.

1918

Bhagwat Buxh

v.
Sheo Pershad.

Doss, J.

return for the grant of Kanda and Toll," though he adds Dukhbhanjan, Baly or any other shareholder never served the Babu Sahib as *deoridar* (sentry, etc.). The story of the Manjhis having at a subsequent period served as sentries at the plaintiff's residence at Bistrampur may be devoid of foundation, and I think it is, but it does not follow therefrom that the tenure has lost its original character and has acquired a higher status in respect of permanency and transferability by reason of the abolition of the service by paramount authority. The opinion of the learned Subordinate Judge that this tenure does not belong to the class of inalienable service *jagirs* is based chiefly on the fact that the Manjhis ceased to render any service after the ghat was taken over by Government, that is, during the last twenty or twenty-two years. In my opinion this alone is not sufficient to convert a *jagir* conditional on service into an absolute and unconditional grant. The tenure being thus one within the class of customary service *jagirs*, it is *prima facie* inalienable and no evidence has been adduced by the defendants that it is otherwise. In spite of repeated efforts on the part of the father of the defendant No. 1 and of the defendant No. 1 himself during the last quarter of a century to obtain a recognition of themselves as transferees of the rights of the Manjhis in the two mouzas, they never succeeded in their attempt.

Some stress was laid by the learned Counsel for the respondent on a certificate of sale, dated the 28th June, 1884, in respect of an 1 anna 3 pies share of mouza Kanda in execution of a decree obtained by the sub-manager of Encumbered Estates, Palamow, against Manbodh Manjhi. Except the statement of the defendant No. 1 himself in his deposition, there is nothing on the record to show that it was a decree for rent due in respect of mouza Kanda. But even assuming for the sake of argument that it was, I do not think that a sub-manager of Encumbered Estates can by any act of his impress upon a tenure the character of transferability so as to be binding on the proprietor, if in its origin it did not possess that character. The two mouzas in suit being thus found to be non-transferable, the purchase of the defendants must be held to be invalid and they are therefore in possession without any title.

I am of opinion, therefore, that the plaintiff's suit and this appeal ought to be decreed with costs.

As my learned brother, however, concurs in the judgment of

the Court below, the decree of the Court below is affirmed, and this appeal is dismissed with costs.

Richardson J.—The plaintiff in this suit—Babu Bhagwat Buksh Roy (son of Babu Lachmi Buksh Roy)—is the proprietor of Tappa Taraia in the Purgana and Zilla of Palamow, and the appellant before us. The suit relates to two mouzas, Kanda and Toli in Tappa Taraia, of which the plaintiff seeks to recover possession on the ground that they were held as *jagir* on a service-tenure by Dukhbhanjan and Baly Manjhi and their ancestors, and that under the conditions of the tenure they were not transferable or alienable. The defendants claim to be the purchasers from the Manjhis of the whole of mouza Kanda and of 15 annas of mouza Toli by a series of transactions (24 in number), extending from 1875-99. As the learned Subordinate Judge remarks at the outset of his judgment the fact that the purchases were made is in effect admitted by the plaintiff, nor, as I understand, is it denied on the other side for the purposes of this case that by the custom of the district or the Pergana a *jagir*, held on a service-tenure, that is burdened with the performance of a service, is alienable. The principal question for determination therefore is the nature of the tenure on which the two mouzas in question were held.

It is clear that they were held as a *jagir* of some kind on a quit-rent of Rs. 19 a year. But this is not to my mind conclusive as there may be different kinds of *jagirs* to which different incidents attach: *Lakhamgavda Basaprabhu v. Keshav Annaji Kulkari* (1).

The Subordinate Judge has recorded a careful judgment, and I do not propose to enter in detail into all the facts. As regards this question of the service, attached to the *jagir*, I need only say that the plaintiff's case is that the service consisted of Ghatwali service at Kanda Ghat until about the year 1886, when Government made its own arrangements for guarding the ghat by its police officers. It may be that at one time the tenure was in part or in whole a Ghatwali tenure, but I am not satisfied by the evidence that this was so, and it is at the least matter of serious comment that the case put forward by the plaintiff's father in the litigation of 1867-69 is altogether inconsistent with the existence of any duty on the part of the Manjhis to perform any service at all. Before turning to that litigation, I will say at once that whether or not any such duty ever existed, I

CIVIL.

1918.

Bhagwat Buksh

v.

Sheo Pershad.

Dutt, J.

(1) (1901) I. L. R. 28 Bom. 805.

CIVIL.

1918.

Bhagwat Buxh

v.

Shoo Pershad,

Richardson, J.

accept unreservedly the finding of the Subordinate Judge that no service of any kind has been performed since 1869, when the litigation terminated. The grounds on which the Subordinate Judge has come to this conclusion are, to my mind, unassailable.

Now what was the case which the plaintiff's father endeavoured to establish in 1867? He alleged that the two mouzas had been leased for a life or lives to ancestors of the defendants in the suit (Ritbaran Manjhi on his own account and as guardian of Dukhbhanjan Manjhi and others) that the grantees were dead, and that he was entitled to recover possession from the defendants. He said nothing about services. The precise title which the defendants put forward is not a matter of much moment provided, it is recognised that they claimed to hold a permanent and transferable tenure. In their written statements, they asserted that the property was *khunt-kant* "reclaimed by Ghansham Manjhi, the common ancestor of the defendants and of other share-holders by clearing jungle and uprooting shrubs." They further stated that Babu Gajraj Rai, ancestor of the plaintiff, had granted a *patta* of *jagir-ba-farsandan* [a heritable *jagir*], to Chulhai Manjhi and Chainu Manjhi; at the trial the plaintiff produced no documentary evidence. The Deputy Commissioner found that the defendants and their ancestors had been in uninterrupted possession of the mouzas for at least 40 years and that the plaintiff had entirely failed to prove his case. He thought it not necessary to allude further to the defendants' title than to say that "regarded relatively there is much more evidence before the Court to prove it than there is to prove plaintiff's claim." He made a decree dismissing the suit, and the decree was upheld by the Judicial Commissioner of Chota Nagpur and the High Court—Sir William Markby delivered the judgment of the High Court and in doing so he made the following observations:—"The case came before the Court, in this shape, the plaintiff claimed the land as proprietor, the defendants admitted the general proprietary right of the plaintiff. The defendants and the plaintiff agreed that some 40 years ago the land passed into the possession of the defendants' ancestors but the plaintiff alleged that that was a grant to three specified persons, the last of whom died in the year 1858 *i.e.*, 9 years before the commencement of this suit. The defendants alleged that it was a grant in the nature of a *jagir* given for certain services, and it is admitted that they remained in possession up to the time that the suit was brought."

"I think that under these circumstances and without laying down any general rule as to presumption, but simply proceeding upon the circumstances of this particular case, the Judge of the lower appellate Court was perfectly justified in saying as he did that before giving the plaintiff a decree, he would require him to show that the title he once admits to have been in the defendants' ancestors has expired."

"I think he has said no more than that and that so far he was perfectly right. I think therefore that the special appeal ought to be dismissed but without costs as no one appeared for the special respondents."

It ought to be mentioned that the defendants in the suit asserted the existence at one time of a document on which they founded their title and as to this the Judicial Commissioner of Chota Nagpur said :—"It appears from a petition, dated the 30th December, 1867, filed by the plaintiff in this case that the defendant's parents did file the document they received from his ancestor in a case before the Adalat Dewani at Lohardaga which, with all the other records, were destroyed in the mutiny." These words were written in 1868. They refer to an admission by the plaintiff's father that there had been a document and they account for the loss of the document. It is impossible at this distance of time to sift the facts or to attempt to trace the document or to discover its terms. The delay in bringing the matter to an issue is not the fault of the defendants. Neither the plaintiff nor his father have at any time produced any document from the zamindari office, which throws any light on the nature of this particular tenure. Documents are produced which relate to other tenures and among them is a document of 18th November, 1800 (Exhibit 2).

As to the words used by the High Court in stating the case put forward by the defendants that they claimed to hold the tenure as a *jagir given for certain services*—in my opinion the view taken by the Deputy Commissioner is the correct one. It is obvious that the words underlined are ambiguous. They may refer to an absolute grant for services already performed or to a grant burdened with the performance of a service. These distinctions are clearly stated in the case to which I have already referred and I may add that that case rests on two earlier cases which arose in this province, one of which was decided by the Privy Council and one by this Court. I think having regard to the case which the plaintiff made and to the

CIVIL.

1913.

Bhagwat Buxah
v.
Sheo Pershad.

Richardson, J.

CIVIL.

1918.

Bhagwat Bukah

v.

Sheo Pershad.

Richardson, J.

case which the defendants made that the present plaintiff can derive no advantage at all from the use of the words in question by the Court.

The judgment of the High Court was delivered in September, 1869. The first of the transactions on which the present defendants found, took place in 1875. A purchase was made in 1880 and five more were made in 1882 in which year the plaintiff's father died. The estate, which he had held and which then devolved upon his son, was encumbered and came under official management under the Encumbered Estates Act. It was released and made over to the present plaintiff in 1893, since when he has managed the estate himself. I have found that no service was ever rendered on account of the tenure in question in 1869, and I think that it is equally clear that no service was ever demanded at any rate up to 1893 and for some years subsequently. The position, therefore, may be stated as follows. A claim put forward in Court is put forward publicly. The claim upon which the plaintiff's father took his stand before the world in 1867 was disallowed by the Courts. He accepted the decision and he took no steps to rectify the position, but maintained a discreet silence on the subject until his death; on the other hand, the defendants or their predecessors claimed a heritable and transferable tenure. This state of things continued during the period when the estate was under management as an Encumbered Estate and during that period there were further purchases by the defendants or their predecessors. In three instances in 1882 and 1884, the purchases were made at auction-sales, held in the course of execution-proceedings and the decree-holder, at whose instance one of these sales took place, was the sub-manager of the Encumbered Estates. It is not proved on whose behalf or on behalf of what estate he was acting, but it remains that the sale was held at the instance of the Encumbered Estates' authorities. So things went on. The defendants or their predecessors obtained possession of more and more of the two Mouzabs. There are rent receipts for the years 1890 and 1891 which acknowledge the receipt of rent as from one of the Manjhis, but show that the rent was paid by Ram Shewak Sahu, the father of one of the defendants. A supplementary paper-book contains a considerable number of rent-receipts some earlier and some later in date, but they are not listed or indexed and they all appear to be of the same character

as those of 1890-91. As the receipts are *marfatwari*, they do not amount to a direct recognition by the landlord of the tenancy claimed by the defendants. But the names of Sheo Pershad Sahu and Ram Sewak Sahu (specially the latter) occur with such frequency that it is hardly possible to suppose that the landlord or his agents were not aware that the Sahus were much interested in the tenure.

It was not till 1901 that the plaintiff made his first attempt to assail the defendants' position. He then applied to the Deputy Commissioner under section 34 of the Chota Nagpur Landlord and Tenant Procedure Act (I B. C. of 1879) for an order putting him in possession of the mouzas on the ground that Dukhbhanjan and Baly Manjhi were dead, and that no heir had applied for registration in their place in his *sherista*. The Deputy Commissioner rejected the application in a judgment, dated 7th September, 1901, (Exhibit A60) which should be read. The decision was confirmed by the Commissioner and the Board of Revenue. From what the Deputy Commissioner says there would appear to be ground for supposing that Dukhbhanjan was not only alive at the time but in collusion with the plaintiff.

The next step was taken by the defendants, who in 1904 applied to the Deputy Commissioner for an order under Section 36 of the Act, requiring the plaintiff to admit them to registry in his *sherista*. The application was acceded to and an appeal to the Commissioner was dismissed. The decision, of course, does not affect the parties in the present suit, and indeed the plaintiff was told to take his case to the civil Courts. But it may be observed that the defendants maintained the position taken by the Manjhis in the litigation of 1867 to 1869, *viz.*, that the tenure was permanent, heritable and transferable.

Now the plaintiff's case is that the claim, put forward by his father in 1867 was false, and that the decision arrived at is not *res judicata* and does not conclude him in the present suit. So far I agree. But on other grounds, I think that the case, which he has set up, is open to the greatest suspicion, and that the suit must fail. I have already dwelt on the fact that things continued for many years in the position in which they were left at the close of the litigation in 1869. The claim made by the plaintiff was rejected by the Courts and the claim made by the defendants in the suit stood unchallenged before the world for over 30 years. In the circumstances,

CIVIL.

1918.

Bhagwat Buksh

Sheo Pershad.

Richardson, J.

CIVIL.

1918.

Bhagwat Buksh

v.

Sheo Pershad.

Richardson, J.

there is at the least a strong semblance of unfairness in the plaintiff coming forward now with a new case and attempting to oust the defendants under colour of a claim, which so far as appears, has never before been openly asserted and for which there is no documentary support of any kind. I do not think that people should play fast and loose with their neighbours in this way and I am disposed, to think that if it were necessary to consider the question the principle of equitable estoppel might be found to apply to this case.

The defendants no doubt are money-lenders, but money-lenders are entitled to justice and other people may sometimes be as grasping as any money-lender. I should not be surprised to learn that the proceedings before the Deputy Commissioner and this suit are due to the heavy *selami* or fee which the plaintiff unsuccessfully attempted to obtain from the defendants as the price of their registration in his *sherista*. In this connection, reference may be made to the evidence of Sheo Prosad Sahu which may be compared with that of the plaintiff. The former says that he had tried to get his name registered, but could not pay the large fee (Rs. 10,000) demanded by the plaintiff. He lent the plaintiff Rs. 2,000 in 1304, a debt which was repaid two years later. The plaintiff denies knowledge of the connection of the defendants with the lands in suit till he instituted his case before the Deputy Commissioner in 1901 (1308). But he admits the loan from Sheo Prosad which he says he repaid in 1307. However that may be and whether the principle of estoppel applies or not, I am of opinion not only that the plaintiff has failed to establish his case, but also that regard being had to the long possession of the Maujhis and the Sabus to the fact that the defendants' father was reduced to putting forward a false case in 1867, and to the subsequent history of the mouzas, there is on the whole a preponderance of evidence in favour of the claim made by the defendants: cf. *Ram Ranjan Chakerbati v. Ram Narain Singh* (1), and *Sri Rajah Sobhanadri's case* (2).

The question of limitation was not much discussed at the bar, but on this question also I am disposed to decide in favour of the defendants. The claim to hold this tenure as a permanent, heritable and transferable tenure was certainly made and made adversely to the landlord in the litigation of 1867-69, and the possession of the tenure under this adverse claim has, in my

opinion, been sufficient in publicity, continuity and extent to admit of the application of the law of limitation: *cf* *Thakore Fatesingji v. Bamanji Dalal* (1), *Seshamma v. Chickaya* (2), *Parameswaram v. Krishnan* (3), and *Ishan Chandra v. Raja Ramranjan* (4).

It may be well to add a few words with reference to certain documents which do not bear directly on the mouzas in question, but were produced by the plaintiff as precedent in his favour. Before doing so, I would add that a perusal of Chapter XI of Volume IX of the Bengal District Gazetteers (recently published) is of some assistance from the historical point of view. As to the admissibility in evidence of such a work for what it is worth, reference may be made to the penultimate paragraph of section 57 of the Evidence Act and to *Garurudhwaja's* (5) case.

Exhibit 2, a deed of 18th November, 1800, has already been referred to.

Exhibit 7 is a judgment of the District Judge of Ramgarh, dated 24th February, 1826. From the last paragraph of the judgment, I gather that the *jagir* in question in that case was one of the superior *jagir* in the district for which see the volume cited pages 127-129.

Exhibit 8 is a letter from the Acting Secretary to the Government of India to the Board of Revenue, dated 25th October, 1827. This also appears to refer to the superior *jagirs*. From the Gazetteer it would appear that the Government has modified the position then taken.

Exhibit 15 is a judgment, dated 27th January, 1831. The same observation applies and moreover the *jagir* in this case was apparently a maintenance *jagir*.

Exhibit 14 is a judgment, dated 6th May, 1833. Here again we have a superior *jagir* granted in lieu of maintenance.

Exhibit 6 is a *robakari* or order by the District Court dismissing an appeal from the judgment of the Pandit of the Court, dated 27th January, 1831, (Exhibit 15).

Exhibit 12 and Exhibit 11 are two judgments by the Assistant Commissioner of Lohardaga and by the Commissioner on appeal, dated respectively, 12th January, 1861, and 22nd February, 1862. It was expressly found that the villages in suit were held on condition of service as *dewari* (sentry). There was

CIVIL.

1918.

Bhagwat Bukeh

v.

Sheo Pershad.

Richardson, J.

(1) (1903) I. L. R. 27 Bom. 515. (8) (1902) I. L. R. 26 Mad. 535.
 (2) (1902) I. L. R. 26 Mad. 507. (4) (1906) 2 O. L. J. 125.
 (5) (1900) L. R. 27 I. A. 288 (at 248); I. L. R. 23 All. 37.

CIVIL.

1913.

Bhagwat Bukah

v.

Sheo Pershad.

Richardson J.

a *sanad* but it was not admitted in evidence because it was unstamped. It may be this precedent which has led the plaintiff in the present suit to allege that after the guarding of the Kanda Ghat was taken over by the Government, the Manjhis served as *dewaris*, an allegation which has been held to be unfounded. In this connection I may add that the oral evidence on the subject of the resumption of *jagirs* admittedly burdened with the performance of a service on the *jagirdar*, failing to perform the service is to my mind beside the mark. As I have said before, this right of resumption under certain conditions is not denied in the present suit.

Exhibit 9 and Exhibit 13 are judgments of the Subordinate Judge at Ranchi and of the High Court on appeal dated respectively, 15th January, 1897, and 17th June, 1898. In this case there was a *jagir patia* which, as the High Court held, showed "that the grant was made on condition of service and loyalty." A *kabuliat*, executed by the lessee of the same tenor, was also produced. Much the same observations apply as have been made above in reference to Exhibits 12 and 11.

Exhibit 5 is a judgment of the Munsiff of Daltonganj, dated 14th May, 1900. He found that the lands in dispute formed a *makurari mourashi jote* (a ryoti holding) and that the holding was not saleable without the consent of the landlord. The case seems to me to have no application or a very distant application to the present case. It was contended for the plaintiff that it is part of the common law or custom of the country that *prima facie*, no holding or tenure is transferable. This may be so or may have been so and there may be parts of the country where the Tenancy Act is not in operation and where in respect of tenures the principle embodied in section 11 of the Tenancy Act is not in accordance with the current of custom or where many or most tenures are not transferable. But it cannot be denied that even in those parts of the country, there may be tenures which are transferable by the terms of their creation or have become transferable as the result of the conduct of the parties interested in regard to them. Reference was made to the case of *Hiramoti Dassya v. Annoda Prosad Ghosh* (1), but that case is quite consistent with what I have said. I have already found on the evidence in this case that the tenure now in question has the attribute of transferability.

Exhibit 10 is a judgment of the High Court, dated 21st

June, 1905. It relates to a maintenance grant and nothing more need be said about it.

To my mind these various documents have no bearing on the present case and I only regret that the plaintiff should have been at the trouble and expense of printing so much useless matter.

Differing with great respect and great reluctance from my learned brother, I think that the appeal should be dismissed with costs.

As there was this difference of opinion, Mr. Justice Doss was for decreeing the appeal and Mr. Justice Richardson for dismissing it,—the appeal was consequently dismissed.

Against this decision the present appeal was preferred under section 15 of the Letters Patent.

Dr. Rash Behary Ghose, Babus Golap Chandra Sarkar and Chandra Sekhar Prosad Singh, Dr. Sarat Chandra Basak, Babus Sajani Kanta Sinha and Harihar Prosad Singh for the Appellant.

Mr. B. Chakravarti, Babus Umakali Mukerji and Raghu Nath Singh for the Respondents.

C. A. V.

The judgments of the Court were as follows :

Jenkins C. J.—The plaintiff is the proprietor of Tappa Taraia, and included in that Tappa are two villages, Kanda and Toli. These villages were granted by the plaintiff's ancestors to the ancestors of Dukhbhanjan and Baly Manjhi, but as the result of several successive sales, some private and some by Court, and dating from 1877 to 1899, the defendants Nos. 1, 2 and 3 claim to be entitled to 16 annas of Kanda and 15 annas of Toli. Defendant No. 4 claims to be entitled to the remaining 1 anna of Toli, as a purchaser. According to the defendants 1, 2 & 3 the price paid by them exceeds Rs. 17,000.

The plaintiff alleges that the two villages were held by Dukhbhanjan and Baly Manjhi and by their ancestors before them on a service tenure on condition of paying Rs. 19 annually for rent and that "the service consisted of Ghatwali service at Kanda Ghat, and afterwards when Government made separate arrangement for guarding the *ghat* by the appointment of police officers, the same consisted of service as sepoy in plaintiff's deori." It is the plaintiff's case that the tenure as being a service tenure, was inalienable and was liable to resumption not only on failure of the grantees or their heirs to render service but also in the event of transfer.

CIVIL.

1913.

Bhagwat Buxsh

v.
Shen Pershad.

Richardson, J.

March, 18.

CIVIL,

1913.

Bhagwat Buxh

v.
Sheo Pershad.

Jenkins, C. J

The plaintiff alleges that Baly Manjhi died, and since 1898 Dukhbhanjan ceased to render service and that on the 7th of September 1901 he became aware of the invalid sale to defendants 1, 2 and 3 and later of the invalid purchase of defendant No. 4. "The cause of action," accordingly to the plaintiff, "arose in 1898 when service was discontinued, and also on the 7th September 1901 date of the Deputy Commissioner's order, and also on the 10th December 1904, date of the order of the Commissioner of Chota Nagpur Division and also when the plaintiff became aware of the invalid transfer to defendant No 4. To these orders of the 7th September 1901 and the 10th December 1904, I will refer later.

It is in these circumstances that the plaintiff has brought this suit whereby he prays as follows :

"a. That it be declared that the *jagir* Mouzas Kunda and Toli are resumable by the plaintiff on the omission of the *jagirdars* to render service for which the mouzas had been granted.

b. That it be declared that the *jagir* mouzas are non-transferable by the *jagirdars*.

c. That it be declared by the Court that the defendants have got no valid title to mouzas Kanda and Toli on account of the invalid transfer and that the plaintiff has become entitled to resume the mouzas Kanda and Toli.

d That the defendants be dispossessed from the entire villages, Kanda and Toli and that the plaintiff be given *khas* possession over the said mouzas."

It has been stated before us by the plaintiff that though the word 'resume' is used, the purpose of this suit is not the imposition of rent or revenue but recovery of actual possession of the land.

All the defendants have contested the plaintiff's claim and their defence succeeded before the Subordinate Judge of Palamow by whom the suit was dismissed. An appeal was preferred to the High Court and heard by Doss and Richardson JJ. They were divided in opinion. The present appeal is under clause 15 of the Letters Patent from the judgment of Richardson J. which was in favour of affirming the decree of the Subordinate Judge and so prevailed.

The principal question is whether the two villages of Kanda and Toli were held on a service tenure and were inalienable and whether they are liable to be forfeited by reason of the non-performance of service and the transfer of the tenure. It is

clearly established that there was a grant of these two villages. Unfortunately the grant cannot be produced as it has been lost. This is due to no fault of the defendants or their predecessors, for it is proved that the document was filed in a case before the Adalat Dewani at Lohardaga, and, with all other records, was destroyed in the mutiny.

But though the original has been lost one would have expected the plaintiff to have in his possession a copy of this document, as he has of others. He however declares that the copies of the *sanads* of mouzas Kanda and Toli are not in his *sherista*.

The grant is one of considerable antiquity, and there has been long continued enjoyment under it. But there has been no lack of endeavour on the part of the plaintiff and his father to regain possession of these two villages free from any tenure created by the grant.

As far back as 1867 Lachmi Buksh Rai, the plaintiff's father instituted a suit in the Court of the Deputy Commissioner of Lohardaga against Rittaran Manjhi for himself and as guardian for others, including Dukhbhanjan, then a minor. The purpose of the suit was to obtain possession of Kanda and Toli, and the case made by the plaintiff was that the villages had been granted to the ancestor of the defendants not on service tenure but as *ijara i.e., ticca* for life, and that the grantees had all died. The defendants by their written statement in that suit alleged possession for more than 60 years, that the property in dispute was *Khutkuthi* property reclaimed by Ghansham Manjhi the common ancestor of the defendants and of other share-holders "by clearing jungle and uprooting shrubs, and that a hereditary grant had been made. The Deputy Commissioner held that the plaintiff had entirely failed to prove his case and he remarked that it was not necessary to allude further to the defendants' title than to say that regarded relatively there was much more evidence before the Court to prove it than there was to prove the plaintiff's claim.

The result was that the suit was dismissed.

An appeal was preferred to the Judicial Commissioner of Chota Nagpur, but it was dismissed, and a special appeal to the High Court met with a similar fate. Delivering the judgment of the High Court Markby J. said that "the defendants and plaintiff agreed that some 40 years ago the land passed into

CIVIL

1918.

Bhagwat Buksh

v.
Sheo Pershad.

Jenkins, C. J.

CIVIL

1918.

Bhagwat Buksh

v.

Sheo Pershad.

Jenkins, O. J.

the possession of the defendants' ancestors, but the plaintiff alleged that that was a grant to three specified persons, the last of whom died in the year 1858 *i. e.*, 9 years before the commencement of this suit. The defendant alleged that it was a grant in the nature of *jagir* given for certain service and it is admitted that they remained in possession up to the time that the suit was brought." Much has been made by plaintiff of the words "given for certain services."

The next attempt to regain possession of the villages was in 1901 when the present plaintiff applied under section 34 of Act I of 1879 B. C. to be put into possession on the ground that Dukhbhanjan and Baly Manjhi were dead, and that no heir had applied to be registered in their place. The application was opposed by Sheo Persad Sahu, Joygobind Sahu and Ramnarain Sahu who maintained that the tenure was not resumable but was granted as a *Khunthati* several generations ago. They further alleged that they had acquired the property by purchase and that Dukhbhanjan was not dead. Their opposition prevailed and the application was rejected on the 7th of September 1907. This is treated by the plaintiff as a cause of action.

An appeal was preferred first to the Commissioner and then to the Board of Revenue, but in each case with no success.

In 1904 the defendants applied under section 36 of Act I of 1879 for an order requiring the plaintiff to admit them as tenure-holders in the registry of his *sherista*. The application was granted and an appeal from this order was dismissed on the 10th of December 1904. This too the plaintiff described as a cause of action.

It is worthy of note that in the earlier proceedings instituted by the present plaintiff and his father neither of them alleges that the villages were held on a service tenure, and yet that would have been a natural allegation to make had there been any foundation for it.

In the judgment of the High Court there is the expression a "*jagir* for certain services," and considerable reliance seems to have been placed on it by the plaintiff. But it is obvious that the services to which Markby J. referred were past and not future services. The actual words of the learned Judge are these, "the defendants alleged that it was a grant in the nature of a *jagir* given for certain services."

Now the defendants did not appear before the High Court so that the allegation must have been that made in the written

statement. But the only services mentioned there is the reclamation by clearing jungle and uprooting shrubs, and that reclamation was a past not a future service. The previous litigation then, so far from helping the plaintiff's case, is really against it, for while it goes to show that there had been a long possession of the property by the Manjhis, there is an absence of any suggestion by the plaintiff or his father of a service tenure. In contrast with this we have the assertion by those opposing the plaintiff and his father that the property was *khutkuthi* and this implies that the tenure was free from any obligation for service. What then is the evidence in this case by which the plaintiff seeks to prove that the villages were held on service tenure?

First the plaintiffs make much of the fact that in a series of documents the villages are described as "my ancestral *jagir-dari* interest" or by some cognate phrase. This, according to the plaintiff, supports his contention that the villages were held on *jagir* tenure, and this he maintains, implies that it is a service tenure. But a *jagir* is not necessarily conditional; it may be unconditional as where it is a grant for services already rendered and this is apparent from *Dasibai v. Ishwardas* (1). Then witnesses have been called to prove that *jagirs* in this District are liable to forfeiture on alienation, but the utmost that they go to show according to the learned Subordinate Judge is that the tenures in Palamow which are known as *jagirs* are as a *general rule* conditional on service inalienable and liable to resumption on alienation or failure of service.

But this class of evidence is of little or no value, for the tenure now in question was created by a document. And where that is so, the terms on which the land is held, its alienability and its liability to forfeiture must depend on the terms of the particular grant, and not on the terms of grants that may have been made to others.

I now pass to the evidence that has been adduced with a view to showing that service has actually been performed in respect of these two villages. The plaintiff's version is that originally there was ghatwali service at Kanda Ghat but about the year 1886 the Government made arrangements for guarding the ghat by their own Police Officers and that the service of the Ghatwals then terminated. The plaintiff himself does not profess to have seen ghatwali service on the ghat and this I can

CIVIL.

1918.

Bhagwat Buksh

v.

Sheo Pershad.

Jenkins, C. J.

CIVIL

1918.

Bhagwat Buhah

v.

Sheo Pershad,

Jenkins, C. J.

well understand, for he did not take over the management of his *reyasat* till 1893, and at that time the ghatwali service could no longer have been in existence. All he is able to say as to this is that he heard from his uncle that all *jagirs* were on the condition of service, that when Kanda Ghat was settled by Government the *jagirdars* of Kanda and Toli served as *durwans* at his residence at Bistrampore. He deposes that when he began to manage his own affairs Dukhbhanjan was one of the *durwans*. The plaintiff's witnesses go further than the plaintiffs: they profess to have seen ghatwali service rendered by Dukhbhanjan and Baly Manjhi at the ghats as well as *durwans* or sentry duty at Bistrampur. The Subordinate Judge did not credit the evidence as to service at the ghat and Richardson J. has accepted his view. Doss J. also agreed with the Subordinate Judge that it was extremely improbable that after the signal success which the Manjhis achieved in the litigation with the plaintiff's father in the year 1867 they would render any service of a personal nature, but influenced by certain considerations to which he alludes, and the evidence of the defendants' witness No. 2 Kharag Manjhi, he came to the conclusion that the ghatwali service must have been discharged by the Manjhis.

But in two important respects the learned Judge was in error: first he was mistaken in supposing that it had never been suggested by the Manjhis that these mouzas had been granted to their ancestors as a reward for some past services rendered by them. In their written statement in the litigation in 1867 they distinctly averred that the property in dispute was *khuikuthi* reclaimed by their ancestor.

Next the learned Judge was mistaken as to the evidence of Kharag Manjhi. We have examined the record and also the Subordinate Judge's notes and I have no doubt that a "never" has dropped out, and that the testimony of the witness was the exact opposite of what the learned Judge supposed.

The Subordinate Judge while unconvinced as to service at the ghats felt it difficult to believe that a person in the position of the plaintiff would come to Court and swear that Dukhbhanjan had actually worked as a sepoy at the *gurb* at Bistrampur, if there were no foundation for the statement.

Doss J. thought the story of the Manjhis having served as sentries at the plaintiff's residence at Bistrampur as devoid of foundation, and Richardson J. evidently was of the same opinion.

But while the Subordinate Judge was not prepared to

disregard the plaintiff's evidence as to the performance by Dukhbhanjan of sentry duty at Bistrampur Gurh, he clearly did not connect that service with the tenure of Kanda and Toli. This I can well understand for if as I think there was not any service after the litigation of 1867,—and it is not suggested that there is evidence of any prior to that,—it is in a high degree improbable that Dukhbhanjan would have undertaken the performance of sentry service in respect of the villages after the abolition of the ghatwali in 1886. To begin with it must be borne in mind that the Manjhis had begun to part with their interest in the villages as far back as 1877, and Dukhbhanjan was party to a *sarpeshgi* mortgage in 1875 and a sale deed in 1882. Then again we have no explanation as to how the sentry or *durwan* service at the palace could have been imposed in place of the service at the ghats and the mere fact that Dukhbhanjan may have worked as a *durwan* at the palace in 1893 falls very far short of proving that this service was an incident of the tenure on which the two villages were held.

The conclusion then to which I come is that no ghatwali service is proved, and that if Dukhbhanjan worked as a sentry or *durwan* at the palace,—a point which I am not prepared to affirm,—it was not as an incident of the tenure on which the villages were held, and that the villages in fact were not held on service tenure. In arriving at this conclusion I have not overlooked the plaintiff's argument that unless the grant was for service to be rendered there was no motive for the grant. But future services are not the sole motive for grants of land, and the defendants' story is at least as probable as the plaintiff's. But if the villages were not held on a service tenure then it is conceded they are not inalienable, and thus the basis of the plaintiff's claim fails.

If the tenure in its origin had been conditional on service, then it would have been necessary to consider whether on the determination of the service either by the Government, or by reason of long failure to perform the same, the lands would not have become alienable : *Radhabai v. Anantrav* (1).

But in view of my finding it is unnecessary for me to pursue this enquiry. Nor need I consider how far the payments made by the defendants and the receipts held by them place an obstacle in the way of the plaintiff's right to recover possession. It is enough for me to say that, for the reasons I have already

CIVIL.

1918

Bhagwat Buksh
v.

Shoo Pershad.

Jenkins, C. J.

(1) (1885, 1. I. R. 9 Bom 198.

CIVIL

1918.

Blagwat Buksh

v.
Sheo Pershad.

Jenkins, C. J.

indicated in my opinion the plaintiff's suit must fail and this appeal should be dismissed with costs.

Harrington J.—This case comes before us in consequence of a difference of opinion between Doss and Richardson JJ.

The suit was for possession of two mouzahs, Kanda and Toli which fall within Tappa Taraia of which the plaintiff is the proprietor.

The defendants, who are in possession of Kanda and 15 annas of mouzah Toli, acquired these estates by a series of purchases from the Manjhis who previously held them under the plaintiff.

The plaintiff says the mouzahs in question were a *jagir*, conditional on the performance of ghatwali services and that as such they were inalienable: and that the Manjhis having alienated them, the plaintiffs are entitled to resume possession.

The defendants on the other hand allege that the tenure in suit is a permanent hereditary and transferable tenure and they are the transferees.

The Subordinate Judge dismissed the plaintiffs' suit.

The case for the plaintiff is that the Manjhis performed the service of guarding the passes as a condition of their tenure of the mouzahs in question, up to about 20 years ago when the Government took over that duty: that then the tenant of the mouzahs acted as a guard or sepoy for the plaintiff as a condition of his tenure, in lieu of the services which had been undertaken by the Government.

To shew that the tenure of these mouzahs is conditional on the performance of services evidence was called to prove that *jagirs*, in the district of Palamow, are burthened with the performance of services and a large number of leases and deeds of sale were produced covering a period of from 1875 to 1899 in which the defendants' predecessors had invariably described the mouzahs as forming their *jagirdari* interest. It was argued that it was well-known in the district that the *jagirs* were conditional service tenures and that by thus describing them the persons from whom the defendants derived their title in effect admitted that the mouzahs were inalienable and it was contended that the expression *jagir* for services rendered, which was applied to the mouzahs in question in the judgment for the High Court in 1867, shewed that they were held on condition of performing service. But the grant itself was not produced. It was stated that the document under which the mouzahs were originally

granted was destroyed with other papers filed in a suit by the defendants at the time of the mutiny and the plaintiffs produced no record from their *sherista* to shew the terms on which the grant was made. In the absence of direct evidence much reliance was placed on the use of the word *jagir* both in the judgment of the High Court and in the documents. But this expression may quite as well refer to past as to future services for a *jagir* is not necessarily a grant conditional on the rendering of services by the grantee nor is it necessarily inalienable.

Wilson in describing a *jagir* says "the assignment was either conditional or unconditional: in the former case, some public service, as the levy and maintenance of troops, or other specified duty, was engaged for: the latter was left to the entire disposal of the grantee."

I do not think that evidence that *jagirs* in the district, were conditional and inalienable would be sufficient to justify the inference that this particular *jagir* was burthened with these conditions without either evidence to prove the terms of the grant or to establish by credible witnesses that the grantees or their successors had for a number of years, performed the services and had not alienated the property. Here though the defendant gives a good reason for being unable to give direct evidence, as to the terms of the grant, the plaintiff gives no explanation of the non-production of any copy or record of its conditions.

Then there is the record of other litigation which tells against the plaintiff.

In 1867 his predecessors sued the predecessors in title of the defendants for possession of the two mouzas, which are the subject of the present suit and in the plaint in that suit it was alleged that the lands had been granted to the defendants for life on their paying Rs.19 for rent and carrying out orders according to zemindary practice.

The plaintiffs were unsuccessful, though they prosecuted their claim up to the High Court, the judgment, dismissing their suit, was affirmed.

It is very significant that in this case the plaintiffs did not allege an inalienable ghatwali tenure, the plaint refers to the defendants "carrying out the orders according to the zemindari practice" and although this might be consistent with the case set up by the plaintiff as to the state of things after the Government had taken over the duty of guarding the passes, it seems to me quite inconsistent with the plaintiff's case as to the state of

Civil.

1918.

Bhagwat Buksh

v.
Shoo Pershad.

Harrington, J.

CIVIL

1918.

Bhagwat Buxsh

Shoo Porshad.

Harrington, J.

things when it was filed in 1867 *vis.*, that at that time the service of guarding the passes was a condition of the tenure.

And the result of this litigation throws the very gravest doubt on the truth of the oral evidence that services were actually performed since 1867 for as the Judge points out it is very unlikely that having been successful in this litigation, the tenants would burthen themselves with services which they were then held to be not compellable to render.

There is another point which weakens the argument of the appellant that *jagirs* in the district of Palamow, were necessarily inalienable and that in the various deeds of sale, which have been produced, the property is described as *jagir*. I do not believe that persons would have been found to buy if on the face of the sale deed they were buying what the vendor had no power to sell and were getting nothing by their purchase. It is of course possible that a speculator might buy under these conditions but he would give far less than the ordinary market price—I can find no suggestion that the prices given for the *jagirdari* land were less than the usual prices of ordinary land in the district.

There were other legal proceedings which also tell against the plaintiff—particularly proceeding taken by the present plaintiff under section 34, Act I of 1879 (B. C.) to obtain possession of Kanda and Toli on the ground that they had escheated to him through failure of the heirs of the grantees. The objectors while denying that the mouzas were resumable, set up a title by purchase—and the objectors were successful in defeating the plaintiff's claim.

In view of the position asserted by the plaintiff in previous litigations, the absence of direct evidence of the terms of the grant or of evidence which can be believed that any services had been performed within the 40 years, I do not think it can be said that the plaintiff has proved his case. In my opinion therefore the suit should be dismissed.

Mookerjee J.—I agree that the claim of the plaintiff is entirely unfounded.

The plaintiff seeks to recover possession of two villages Kanda and Toli on the ground that the tenure under which they were held by the predecessors of the defendants has been forfeited. His allegation is that the tenure was granted to the ancestors of Dukhbhanjan and Baly Manjhi on condition that the grantees and their heirs in succession would pay a sum of Rs. 19 as annual rent and also render service to the grantor and his

representatives. It is alleged that the service was originally that of a Ghatwal at Kandaghat, and that subsequently when the system of Ghatwals was abolished by Government and Police officers were appointed to guard the mountain passes, the service rendered was that of sentry in the mansion of the plaintiff. The plaintiff further asserts that as a service tenure, it was liable to be forfeited upon failure to render service as also upon alienation of the lands comprised in the grant. The plaintiff seeks to eject the defendants on the ground that performance of service has been discontinued from 1898 and that the lands have also been improperly transferred.

CIVIL
1918.
Bhagwat Bukah
v.
Shao Pershad.
Mookerjee, J.

To determine the rights of the parties, it is essential to bear in mind that their common case is that the grant was made under a written instrument executed in the beginning of the 19th century. The original deed, however, is not forthcoming; it had been filed in Court in a suit in 1857 and was destroyed along with other records at the time of the Mutiny. The plaintiff alleges that he cannot trace in his office a copy of the grant. Consequently, we must proceed on the assumption that so far as the precise terms of the original grant are concerned, neither primary nor secondary evidence is available. The plaintiff has consequently been driven to make an attempt to establish the terms of the grant which he asserts was a *jagirdari* grant by indirect evidence. A considerable body of evidence has been adduced to prove the terms of *jagirdari* grants which are said to be common in that part of the country. The earliest of these grants dates back to the 18th November 1800 and is nearly contemporaneous with the lost grant. It is fairly clear, however, that evidence of this class, even if it be assumed to be admissible, is necessarily of little value. It was ruled in *Hollingham v. Head* (1), that where the question is, whether A made a contract with B subject to a certain qualification, evidence of the fact that he made contracts with other persons subject to the same qualification, is inadmissible. Mr. Justice Willis observed as follows: "Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion To admit such speculative evidence would I think, be fraught with great danger." To the same effect are the decisions in *Carter v. Pryke* (2),

(1) (1858) 4 O. B. N. S. 388; 114 R. R. 780.

(2) (1793) Peake 95

CIVIL
1918.

Bhagwat Bukah
v.
Sheo Parshad.
Mookerjee J.

Spencely v. Wilmot (1), *Smith v. Wilkins* (2) and *Borden v. Keverberge* (3). The case of *Woodward v. Buchanan* (4) is clearly distinguishable and is not opposed to this view. But it has been said that the terms on which A let land to tenants other than B may be admissible to show the terms on which he let land to B, if all the lands are subject to the same custom : *Doe v. Sisson* (5). Even if it be assumed, therefore, that evidence of this description is not inadmissible, but that, as has been maintained on high authority (*Wigmore on Evidence*, section 377), the question in each instance is merely of the probative value of the particular facts offered in evidence, it is plain that the evidence adduced in the present case is entirely valueless. The element of a different personality is so important in affecting the making or the terms of a contract that the likelihood of making a similar contract with different persons is very much smaller, when a contract is sought to be evidenced by other contracts with different persons than even in the case where a contract is sought to be evidenced by other contracts with the same person. I hold, therefore, that evidence of this description is of no assistance to the plaintiff.

The plaintiff then relies upon the fact that in numerous deeds of sale under which the properties in suit have been transferred in part from time to time, the transferors have, with singular uniformity, described the interest they had as their ancestral *jagirdari* and he contends that the term *jagir* implies an inalienable service tenure. This contention is clearly unfounded, though it is sought to be supported by a reference to Hunter's Statistical Account of Bengal, Vol. 16, 392, 396. It is well-known that the term *jagir* does not necessarily imply a conditional grant, and it was pointed out by Harington in his Analysis of the Bengal Regulations, Vol. III, page 405, on the high authority of the Minute by Sir John Shore dated the 2nd April 1788 that *jagirs* were of two kinds, conditional and unconditional. This is accepted as an accurate statement by Field in his introduction to the Bengal Regulations, page 53. This view is also supported by the decision of their Lordships of the Judicial Committee in *Dosibai v. Iswar Das* (6) which confirmed the judgment of the Bombay High Court in *Dosibai v. Iswardas* (7) (See also the elaborate note by Wilson in his Glossary, page 224). Consequently, we must take it that the

(1) (1806) 7 East 108.

(4) (1870) L. R. 5 Q. B. 285.

(3) (1888) 6 C. & P. 180.

(5) (1810) 13 East 62.

(6) (1886) 2 M. & W. 61.

(7) (1891) L. R. 18 I. A. 22; I. L. R. 15 Bom. 222.

(7) (1885) I. L. R. 9 Bom. 561.

mere fact that the tenure is described as a *jagir* is by no means conclusive, and that its incidents must be determined from other circumstances. One characteristic, however, is beyond the pale of controversy, namely, that the grant was heritable. As was pointed out by Sir Barnes Peacock in the case of *Koolodeep Narain Singh v. Mahadeo Singh* (1) which was heard by a Full Bench of this Court and ultimately taken before the Judicial Committee of the Privy Council, *Kooldeep v. Government* (3), if it is proved by long uninterrupted usage that the lands have passed from ancestor to heir, that is, from father to son, for two or three generations without objection, the inference would be that the grant was a grant of inheritance, because the fact of descent from father to son is the strongest possible evidence of its hereditary character. In the present case, the lands have descended from ancestor to heir from generation to generation. We have in addition the significant fact that on the 26th September 1867 the plaintiff sued in ejectment on the allegation that the grant was for life; this was repudiated by the defendant in that suit in his written statement dated the 23rd December 1867 in which he asserted that the lands had been reclaimed by the grantee and that the tenure was a *jagir ba farsandan*. The primary Court dismissed the suit on the 23rd August 1868; this decree was affirmed on appeal on the 18th March 1869 and ultimately by this Court on the 6th September 1869. The plaintiff is consequently constrained to accept the position that the grantees hold under a hereditary tenure.

As already stated, the evidence of grants to other persons and the description of the property as *jagir* are of no assistance to the plaintiff. He has consequently endeavoured to prove that the grantees have always rendered service to him. The evidence must be examined in relation to three successive periods of time, namely, *first*, from the date of the origin of the grant, to 1867, when the suit for ejectment of the representative of the grantee was commenced; *secondly*, from 1867 to 1886 when the Ghatwali service was discontinued; and, *thirdly*, from 1886 to 1898 when, according to the plaintiff, service was discontinued completely. As regards the first of these periods, there is no evidence that service was rendered at any time prior to 1867. As regards the second period, the Subordinate Judge was not favourably impressed with the evidence of performance of Ghatwali service and the criticisms advanced on behalf of the

CIVIL

1918.

Bhagwat, Buksh

a

Sheo Pershad.

Mookerjee, J.

(1) (1866) 6 W. R. 199; B. L. B. Sup. vol. 559.

(3) (1871) 14 M. J. A. 247.

CIVIL.

1918.

Bhagwat Buksh

v.

Sheo Pershad.

Mookerjee, J.

appellants in this Court are not sufficient to show that the Subordinate Judge took an erroneous view of the matter. As regards the third period, the Subordinate Judge was inclined to believe that one of the representatives of the grantees did render service as sentry or gate-keeper in the mansion of the plaintiff. This evidence, however, has not been accepted by Mr. Justice Doss and Mr. Justice Richardson as trustworthy. On the whole, therefore, the evidence of performance of service at any period is unsatisfactory, and the difficulty in the way of the plaintiff is enhanced by the fact that he must establish not only that service was rendered but also that it was rendered by the predecessor of the defendants as holders of the *jagirdari* tenure in question. This part of the case, however, is not free from doubt, and the fact of payment of certain assessment to the Government may possibly tend to show that Ghatwali services were at one time annexed to the tenure; but it is clear that even if we hold that services were annexed to the tenure, the case for the plaintiff is full of difficulties.

In the first place, assuming it to be established that performance of service was annexed to the grant, the plaintiff has not proved whether the grant was a mere grant in lieu of wages or was a grant subject to a burden of service. This distinction, as pointed out by the Judicial Committee in *Venkata v. Sobhanadri* (1) where the view previously taken in *Lilinand v. Manoranjan* (2) and *Forbes v. Meer Mahomed* (3), was re-affirmed, is of a fundamental character; and, if, as there is good reason to hold, the grant was made as a reward for past service, namely, reclamation of the land, the plaintiff would have to prove that merely because performance of service was annexed to the grant, non-performance thereof entitles him to treat the tenure as forfeited. This he has not done. In the second place, assuming that the original service was Ghatwali, the plaintiff would have to establish that when such service became unnecessary by reason of the action of the State, he was entitled in lieu thereof to claim the performance of another kind of service, namely, sentry-duty at his mansion. This he has not established. In the third place, assuming that performance of service could be claimed and has been improperly refused, plaintiff has to establish that where a tenure is held on condition of payment of rent in cash, and the performance of some service, he is

(1) (1906) L. R. 33 I. A. 46; I. L. R. 29 Mad. 52.

(2) (1878) L. R. I. A. Sup. Vol. 181; 18 B. L. R. 124.

(3) (1870) 18 M. I. A. 488, 5 B. L. R. 529; 14 W. R. P. C. 28.

entitled to treat the tenure as forfeited because performance of service has been refused though the cash rent has been tendered. This the plaintiff has not proved. In the fourth place, there is no pretence that the plaintiff himself has paid the sum annually payable to the State which the grantee had to pay on his behalf; if such payment has been made from year to year by the grantee, the plaintiff has to prove that notwithstanding such payment, the tenure has been forfeited. This position he has not even attempted to establish. In the fifth place, it is clear that assuming that Ghatwali service was rendered at any time, such service terminated in 1886, and there is no reliable evidence of the performance of service at any subsequent period by the representative of the grantee in his character as holder of the tenure. The surrounding circumstances make it very improbable that such service should have been performed. The holders of the tenure began to transfer the lands as early as the 29th of November 1875, and there were numerous successive transactions from that date to the 16th March 1899. It is extremely improbable, to say the least, that while the tenure-holders were repeatedly acting on the assumption that they held a transferable tenure, they continued to perform service on the theory that they held an inalienable service tenure. We must take it, therefore, that service, if ever rendered, terminated in 1886. If, then, the tenure was forfeited on this ground, the forfeiture took place in 1886, while the present suit was not commenced till the 8th December 1905. At the date of the institution of the suit, consequently, any possible claim of the plaintiff to enforce performance of the service or to recover possession on the ground of forfeiture by reason of non-performance of service was barred by limitation. The question necessarily arises, whether the plaintiff is, notwithstanding this fact, entitled to eject the defendants on the ground of forfeiture by transfer of an inalienable tenure. The decision of the Full Bench of the Bombay High Court in *Radhabai v. Anantarav* (1) militates against the acceptance of the contention of the plaintiff. On principle, it may well be maintained that when service can no longer be enforced and the tenure consequently ceases to be a service tenure, the land can be alienated; when an estate is freed from the burden of service, the reason for the preservation of the estate as inalienable disappears; alienation can be prohibited only with a view to prevent the permanent severance of the estate

CIVIL.

1918.

Bhagwat Bukah

v.

Sheo Pershad.

Mookerjee, J.

(1) (1885) I. L. B. 9 Bom. 198.

CIVIL.

1918.

Bhagwat Bhus

Shoo Pershad.

Mookerjee, J.

from the services annexed to it (see also *Vasanji v. Lallu* (1) and *Bai Devkore v. Amritram* (2) which are not opposed to this view. The decision of the Judicial Committee in *Padapa v. Swami Rao* (3) which reversed the decision in *Swami Rao v. Padapa* (4) is clearly distinguishable. The question there in controversy related to the status of a person who had acquired good title to a Vatan by adverse possession, and it was ruled that he would *prima facie* be in the same position as the person lawfully entitled to the Vatan, though it was pointed out that if the adverse possessor were an independent trespasser and did not claim to be a Vatandar, other considerations might arise. In fact, the question before the Judicial Committee was similar to that raised before the Court of appeal in England in *Tichborne v. Weir* (5) and in *O'Connor v. Foley* (6) where the question arose as to the liability of a trespasser who had acquired title as against the lessee by adverse possession for the statutory period; it was ruled that the adverse possessor was not bound by all the terms of the lease. The position, however, is fundamentally different where, as between the grantor and the grantee, the grantee acquires by lapse of time a right to refuse service to the grantor. In a case of this description, the view may well be maintained that as the tenure had lost its character of service-tenure, the fetter of inalienability had been removed. From every possible point of view, therefore, the claim of the plaintiff turns out to be unsustainable and must be held to have been rightly dismissed.

A. T. M.

Appeal dismissed.

(1) (1885) I. L. R. 9 Bom. 285.

(2) (1885) I. L. R. 10 Bom. 37

(3) (1900) L. R. 27 I. A. 58; I. L. R. 24 Bom. 556

(4) (1892) I. L. R. 18 Bom. 22.

(5) (1892) 67 L. T. 735.

(6) (1905) 1 I. R. 1.

CIVIL REFERENCE.

Before Sir Asutosh Mookerjee, Knight, Judge.

IN THE GOODS OF HARRIETT TEVIOT KERR, DECEASED.*

Court-fee—Probate, application for—Court-fee, assessment of—Court-Fees Act (VII of 1870), Sch. I, Art. 11 and Sch. III—Court-Fees Act, interpretation of.

The Court-fee payable in respect of the estate left by the deceased is to be calculated upon the net value of the estate obtained by deduction of the amount of the debts from the gross value of the estate.

The Collector of Malda v. Nirodo Kamini Dasg (1) doubted.

The true mode of interpretation of a statute like the Court-Fees Act, which has been repeatedly amended, is not to consider individual sections, but to take

* Reference under section 5 of the Court-Fees Act, 1870.

(1) (1912) 17 O. W. N. 21.

CIVIL.

1918.

June, 24.
August, 27.

them as a whole and to give effect to the legislative intent upon a particular matter.

Reference under section 5 of the Court-Fees Act, 1870, by the Taxing Officer on the Original Side of the High Court.

An application was made by the Administrator-General for probate of the last will of H. T. Kerr. The question was, what was the proper amount of duty payable in respect of the estate left by the deceased. The Taxing Officer on the Original Side referred the case on the 28th May, 1913 under section 5 of the Court-Fees Act to the Hon'ble the Chief Justice or of such Judge as the Chief Justice shall appoint with the following

REPORT.

This is an application by the Administrator-General, for probate of the last will of the deceased, upon which a question now arises as to what is the proper amount of duty payable in respect of the estate left by the deceased.

The application being by the Administrator-General no affidavit of valuation, such as is required in the case of an ordinary applicant by section 19H of the Court Fees Act, is necessary, under the decision, *In the goods of R. J. Audall* (1).

In accordance with the practice the Administrator-General has set out in his petition a list of the estate and in another list the debts payable out of the estate. The value of the estate in the first list is given at Rs. 2,17,896-13-7, and the amount of the debts in the second list at Rs. 1,99,830-10-1½ leaving a balance of Rs. 18,066-3-5½.

The question now arising for consideration is *at what rate* should duty be charged on such balance.

This question arises owing to a letter from the Collector of Stamp Revenue No. 295 R S., dated the 23rd September 1912.

When that letter came in I submitted it with the following note to Mr. Justice Fletcher for his opinion.

"The annexed letter from the Officiating Collector of Stamps Revenue No. 295, dated the 23rd September last raises an interesting question with regard to the proper fee payable in respect of estates when probate or letters of administration are applied for. By Article 11-Schedule I of the Court Fees Act XVII of 1870 the fee was 2 per cent. on the amount or value of the property in respect of which the grant was made, if such amount or value exceeded Rs. 1,000.

In the year 1904 a question seems to have been raised before

CIVIL.

1913.

In the goods of
Harriett Teviot Kerr,
deceased.

CIVIL.

1918.

In the goods of
 Harriett Teviot Kerr,
 deceased.

the Board of Revenue as to the correct method of calculating the fee where the gross estate was over Rs. 1,000, but, after deduction of the debts etc, set out in annexure B, the net value of the estate was reduced below Rs. 1,000.

The then Advocate-General's opinion was obtained by the Board ; that opinion is set out on pages 20 and 21 of the Bengal Stamp Manual. The Advocate-General was of opinion that "in the first instance the Court is to see what the fee is when levied on the whole estate, and in order to find the true amount payable as duty, 2 per cent. of the whole amount or value, which the petitioner is entitled to deduct, is to be deducted from the total fee leviable in respect of the whole estate." *i.e.*, he thought that we should calculate the duty on the amount set out in annexure B, the duty on the amount set out in annexure A deducting one duty from the other and where the gross estate was over Rs. 1,000, duty, he thought, was payable notwithstanding the fact that the deduction of the debts brought the value of the estate below Rs. 1,000. Since then the Court following that opinion has always charged duty upon *such* estates in this manner.

Now when the duty was 2 per cent. it did not matter whether you calculated the duty on the amount in annexure B, the duty on the amount in annexure A and deducted one duty from the other or whether you deducted the amount set out in annexure B from the amount set out in annexure A and calculated duty on the difference ; the result was the same ; and having regard to the form of the affidavit set out in Schedule 3 to the Court-Fees Act by which the amount in annexure B, which is not subject to duty, is deducted from the amount set out in annexure A, and a net total shewn, we have always adopted the latter course calculating the duty on the net balance.

Article 11 of the Court-Fees Act was by Act VII of 1910 amended and the fee chargeable was changed ; 2 per cent. being charged when the amount or value of the property in respect of which the grant is made exceeds Rs. 1,000 but does not exceed Rs. 10,000 ; $2\frac{1}{2}$ per cent. when such amount or value exceeds Rs. 10,000 but does not exceed Rs. 50,000 ; and 3 per cent. when such amount or value exceeds Rs. 50,000.

The office, however, does not appear to have changed its practice. It has continued to deduct the amount set out in annexure B, from the amount set out in annexure A and has charged duty on the *balance at the rate* (for such balance) given in Act VII of 1910.

The Officiating Collector now claims that this is wrong having regard to the Advocate-General's opinion above referred to, and he has referred to three cases.

For the purposes of illustration it is only necessary to refer to one of these. *In the goods of E. S. Wenger* the amount set out in annexure A was Rs. 10,024-6-5, the amount set out in annexure B. was Rs. 186, the net total being Rs. 9,838-6-5. Duty was charged on this net balance at 2 per cent., it being under Rs. 10,000.

CIVIL
1918.
In the goods of
Harriett Taviot Kerr,
deceased.

If the Collector's contention is correct we ought to have calculated duty at $2\frac{1}{2}$ per cent. on Rs. 10,024-6-5, and then calculated duty on Rs. 186—at what figure? I suppose his argument would be that we should deduct it at the same rate as is chargeable on the gross value of Rs. 10,000. The amount of duty calculated in that way would have been Rs. 246-4, whereas duty was only taken for Rs. 197, there being a difference of Rs. 49-4.

Now the question is whether this method of calculation is correct or whether our practice of deducting the amount in annexure B from annexure A and taking the duty on the balance at the rate given in the Amending Act VII of 1910 on the amount of such balance is correct. In this connection I would refer to the form of the affidavit of valuation given in Schedule III to the Court-Fees Act from which it will appear that from the total of the value of the estate set out in annexure A is to be deducted the amount shown in annexure B *as not subject to duty*. If the amount in annexure B is not subject to duty at all, is the Collector's contention that we should calculate duty upon it correct?

I would also refer to section 19B of the Act which provides as follows :—

"Whenever it is proved to the satisfaction of such authority that an executor or administrator has paid debts due from the deceased to such an amount as, being deducted out of the amount or value of the estate, reduces the same to a sum which, if it had been the whole gross amount or value of the estate, would have occasioned a less Court-fee to be paid on the probate or letters of administration granted in respect of such estate than has been actually paid thereon under this Act.

Such authority may return the difference, provided the same be claimed within three years after the date of such probate or letters."

OCTIL.

1918,

In the goods of
 Harriett Tevlot Kerr,
 deceased.

"Before replying to the Collector I desire to take Your Lordship's opinion on this point. If Your Lordship thinks that there is no doubt about it, or that, having regard to the fact that the opinion of the Advocate-General referred to has never been questioned, it would be more convenient to have these points raised when the next case comes up before me, when I could refer the point to the Chief Justice under section 5 of the Court-Fees Act, I could so reply to the Collector."

His Lordship's opinion was stated as follows :

"In my opinion the views expressed by the learned Registrar in this note are clearly right. I, as at present advised, do not agree with the opinion of Mr. O'Kinealy when Advocate-General. The form clearly shows that duty is not to be calculated on the amount of the debts. I can see no answer to the Registrar's view.

Take for instance the case of an estate in England exceeding one million gross but net only £20,000. Can it be seriously suggested that the duty is at the rate of 8 per cent. on the small balance of £20,000 instead of 4 per cent. on an estate of the value of £20,000."

Thereupon I, under His Lordship's directions, informed the Collector that we should continue to follow our practice even in estates where the gross value is over Rs. 1,000 but the net value below that amount.

Subsequently the Board of Revenue in their letter No. 294A, dated 23rd January 1913 referred to this matter and drew attention to a recent ruling of this Court published at pp. 21 to 25 of the C. W. N. Vol. XVII. *The Collector of Maldah v. Nerode Kamini Dassy* (1). The question in that case was simply whether duty was payable at all in a case where the gross estate was valued over Rs. 1,000, and the appellate Court (Stephen and Richardson JJ.) held that having regard to the wording of Article 11 of the 1st schedule of the Court-Fees Act, duty was payable on the ground, as I understand the judgment, that exemption is only allowed in cases where the gross amount or value of the property *in respect of which the grant is made* does not exceed Rs. 1,000. The gross value of the estate in that case was only Rs. 1,985. So no question arose as to the rate at which duty was to be charged on the net value.

In the present case however that question does arise.

If duty is to be calculated on the principle mentioned in the

(1) (1912) 17 C. W. N. 21.

Collector's letter based upon the opinion of the late Advocate-General, Mr. O'Kinealy, we ought to calculate duty at 3 per cent. on the gross assets Rs. 2,17,900 = Rs. 6,537, then duty on the debts Rs. 1,99,850 at the same rate = Rs. 5,995-8 making a duty of Rs. 541-8.

The applicant however contends that duty should be calculated at $2\frac{1}{2}$ per cent. on the net assets, Rs. 18,100, Rs. 452-8 only,—the difference in the two methods of calculation being in the present case Rs. 89.

The difficulty has I think arisen by reason of the Court-Fees Act having been amended piece-meal from time to time. Originally by the Act of 1870 duty was payable on the gross value of estates where such value exceeded Rs. 1,000 the words in Article 11 of Schedule I being—"If the amount or value of the property *in respect of which the grant * * * is made* exceeds Rs. 1,000."

Those words are, as pointed out in the case in XVII C. W. N. unmistakably a description of gross and not net value, and there was no provision then in the Act allowing for deductions.

In July 1871 by Financial Notification No. 2004 the Governor-General in Council remitted the fees in respect of property to which a deceased person was entitled as a trustee, and thereafter it was the practice to exempt from payment of duty such portion of the estate as proved to be trust property.

In 1872 a question appears to have arisen with regard to the power of the Local Government to allow refunds of stamp duty in cases where the assets were subsequently proved to be of less value than had been estimated at the time the duty was paid, and power was given to the Local Government to sanction such refunds pending legislation on the point; subsequently also by a Notification No. 2504, dated 18th April 1873 the Chief Executive authority under Local Government was empowered to allow refunds of duty, if he thought right, in respect of such portion of the assets as had been actually applied in discharging the debts of the deceased.

These two matters were subsequently embodied as sections 19A and 19B of the Court-Fees Act by the amending Act of 1875.

In 1899 however sections 19H to 19K were added to the Act by the amending Act XI of 1899. By section 19I of that Act it is provided that "no order entitling a petitioner to the grant of Probate or Letters of Administration shall be made upon

CIVIL.

1918.

In the goods of
Harriett Tevlot Kerr,
deceased.

CIVIL.

1918.

In the goods of
Harriett Terriot Kerr,
deceased.

an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on *such* valuation."

Turning to the form in the third schedule it will be seen from paragraph 1 that the applicant is to set forth in annexure A "all the property and credits of which the above-named deceased died possessed or was entitled to at the time of his death, and which have come or are likely to come to my hands" and at the end of Annexure A it is stated "deduct amount shown in Annexure B *not subject to duty.*"

From paragraph 2 of the affidavit it will be seen that the applicant is to set forth in Annexure B all the items which by law he is allowed to deduct and from Annexure B itself it will be seen that the items he is allowed to deduct are debts due and owing from the deceased payable by law out of the estate:

Funeral expenses; Mortgage encumbrances; Property held in trust; *other property not subject to duty.*

The result of this amendment by the Act of 1899, it is submitted, is that only the value of the estate in Annexure A *after* deduction of the value shown in Annexure B not subject to duty, is liable to duty. The Legislature however did not amend Article 11 of Schedule I which still contains the words "in respect of which the grant is made." Hence the difficulty.

As I pointed out in my note to Mr. Justice Fletcher when the duty was 2 per. cent. it did not matter which way the calculation was made, but since the sliding scale was introduced by the Act of 1910 it makes a difference in the way I have pointed out.

If the Collectors' method of calculating the duty at the *higher* rate leviable under the Act of 1910 on the gross amount, deducting duty calculated at the *same* rate on the value of the items set out in Annexure B is to be followed, it means that duty will have been calculated on items which are by this form of affidavit of valuation expressly stated to be not subject to duty.

The Administrator-General in a note he has made on this point, a copy of which he has sent me, draws attention to the words of Article 11 of the 1st Schedule of the Court-Fees Act "when the amount or value of the property in respect of which the grant is made," and he asks what is the amount or value of the property in a case where the estate is subject to a mortgage. He submits it is only the value of the equity of redemption as that is the only property which devolves upon the Administrator.

He points out however that an Administrator would not be allowed to insert that in his affidavit of valuation inasmuch as the Form in Schedule III requires the property itself to be set out in Annexure A, and the mortgage incumbrance in Annexure B.

He also points out that where the deceased held property as trustee such property has (see the Form) to be shewn both in Annexure A and Annexure B, and if the Collector's principle is followed duty will have been taken on property not belonging to the deceased and which the Legislature has in the notification, I have referred to, exempted from payment.

I am requested by Messrs. Leslie and Hinds, Attorneys for the Administrator-General to refer this matter to the final decision of the Hon'ble the Chief Justice.

As the question is one of general importance I refer the same in pursuance of the provisions of section 5 of the Court Fees Act (VII of 1870) to His Lordship's final decision.

The Reference then came to be heard by Mr. Justice Mookerjee on June 24th.

Mr. Pugh for the Administrator-General.

Mr. C. H. B. Kenrick, K. C. (Advocate-General) and Mr. B. C. Mitter (Standing Council) for the Board of Revenue.

C. A. V.

The following judgment was delivered by

Mookerjee J.—This is a reference under section 5 of the Court-Fees Act, 1870, made by the Taxing Officer on the Original Side of this Court. The circumstances under which the reference has been made are fully set out in the order of reference and need only be recited very briefly. An application has been made by the Administrator-General for probate of the last Will of Harriett Teviot Kerr. As the application has been made by the Administrator-General, no affidavit of valuation, such as is required in the case of an ordinary applicant by section 19H of the Court-Fees Act, has been filed, as laid down in *In re Avdall* (1). But in accordance with established practice, the Administrator-General has set out in his petition a list of the estate, and in another list the debts payable out of the estate. The value of the estate in the first list is given at Rs. 2,17,396-13-7, and the amount of the debts in the second list at Rs. 1,99,830-10-18, leaving a balance of Rs. 18,066-3-58. The question for

CIVIL.

1918.

In the goods of
Harriett Teviot Kerr,
deceased.

August, 27.

CIVIL.

1913.

In the goods of
 Harriett Teviot Kerr,
 deceased.

Meekorjee J.

consideration is, what is the proper amount of duty payable in respect of the estate left by the deceased.

Article 11 of Schedule I to the Court-Fees Act provides that on a Probate of a will or Letters of Administration with or without will annexed, when the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees, a fee of 2 per centum has to be paid on such amount or value. When such amount or value exceeds ten thousand rupees but does not exceed fifty thousand rupees, a fee of two and one-half per centum on such amount or value has to be paid; when such amount or value exceeds fifty thousand rupees, a fee of three per centum on such amount or value has to be paid. On behalf of the Administrator-General, it has been argued that the fee payable ought to be calculated on the difference between the gross value of the estate and the amount of the debts, that is, in the present case, at the rate of two and one half per centum on Rs. 18,066. On the other hand, it has been contended on behalf of the Board of Revenue that the fee payable ought to be calculated in the manner following: namely, the fee payable on the gross value of the estate reduced by the fee payable on the debts. In the case before us, according to this contention the fee payable would be the difference between three per centum on Rs. 2,17,896 and three per centum on Rs. 1,99,830. The question raised is of considerable nicety and by no means free from difficulty, which is attributable to the fact that the Court-Fees Act has been amended piece-meal from time to time.

Sub-section 1 of section 191 of the Court-Fees Act, which was inserted by Act XI of 1899, provides that no order entitling the petitioner to the grant of Probate or Letters of Administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation. When we turn to the third schedule, we find that the petitioner is required to state in the Form of Valuation that he has truly set forth in Annexure B all the items which he is by law allowed to deduct. Annexure A is a statement of the valuation of the movable and immovable properties of the deceased. On the face of the Form, it is clear that the petitioner is required to state the value of the property and is allowed to deduct the amount shown in Annexure B as

ORVIL.

1918.

In the goods of
Harriett Tertiot Kerr,
deceased

Mookerjee, J.

not subject to duty. The petitioner has thus to state the net total of the valuation of the movable and immovable properties of the deceased. When we turn to Annexure B, we find that it is headed "Schedule of Debts etc"; then follow five different items, as to each of which a statement of value has to be made. These are as follows: (1) amount of debts due and owing from the deceased, payable by law out of the estate; (2) amount of funeral expenses; (3) amount of mortgage incumbrances; (4) property held in trust, not beneficially or with a general power to confer a beneficial interest; (5) other property not subject to duty. It is plain that each of the first four items constitutes property not subject to duty; consequently, the principle formulated on behalf of the Board of Revenue, namely, that duty should be calculated upon the gross value of the estate as also upon the debts and the difference taken, is contrary to the legislative provision that the amount of debts due and owing from the deceased and payable out of the estate constitutes property not subject to duty. It is further clear from the second paragraph of the Form of Valuation, read with the last clause of Annexure A and the first and the last clauses of Annexure B, that the Legislature intended that the fee should be payable, only on the difference between the gross value of the estate and the amount of debts; in other words, as debts constitute property not subject to duty, the difference between the gross value of the estate and the amount of debts, alone constitutes property subject to duty. But it has been urged on behalf of the Board of Revenue that Article 11 of the first schedule militates against this view, inasmuch as, that Article requires the fee to be paid on the amount or value of the property in respect of which the grant of probate or letters is made, and it cannot be disputed that the grant of probate or letters is made in respect of the entire estate. In my opinion, the true mode of interpretation of a statute like the Court-Fees Act, which has been repeatedly amended, is not to consider individual sections, but to take them as a whole and to give effect to the legislative intent upon a particular matter. It is conceivable that in 1899 when by section 2 of Act XI of that year, section 19I was inserted in the Court-Fees Act as originally framed, the language of Article 11 of the first schedule was not carefully considered; it is also possible that in 1910 when by section, 2 clause (2) of Act VII of that year, a progressive scale of duty was introduced, the effect of the amendment upon questions likely to arise, was not

CIVIL.

1918.

In the goods of,
Harriett Tevlot Kerr,
deceased.

Mookerjee, J.

specifically realised by the framers of the amending provisions. Still it is the duty of the Court to give effect, as far as practicable to all the sections of the statute as it stands, in its amended form, and the Court cannot rightly be invited to place such a construction upon the new sections introduced as would unquestionably destroy their effect. When the Legislature states explicitly in the third schedule, which was inserted in 1899, that debts due and owing from the deceased are not subject to duty, that the petitioner is by law allowed to deduct the amount of debts from the gross valuation of the estate, and that he is to state in Annexure A the net total value of the estate, the Court should not interpret Article 11 of the first schedule as an isolated provision; but the Court should give effect to the combined provisions of Article 11 of the first schedule and the third schedule. From this point of view, it appears to me indisputable that the fee should be calculated upon the net value of the estate obtained by the deduction of the amount of the debts from the gross value of the estate.

But it has been argued, on behalf of the Board of Revenue, that the construction for which the Administrator-General contends, is opposed to the principle deducible from a long series of judicial decisions. An examination of the cases shows, however, that there is no force in this contention; there is really no judicial decision in which the precise point now under consideration has been examined. In the case of *Collector of Maldah v. Nerode Kamini Dass* (1), the question for consideration was, whether duty is payable in respect of an estate the gross value whereof exceeds Rs. 1,000, but the net value after deduction of debts fall short of Rs. 1,000. It was ruled upon a construction of section 19, clause 8, that the estate was not exempted from liability to pay duty. It is not necessary to decide on the present occasion whether this view is well-founded; it is sufficient to say that I reserve my opinion upon this matter with the remark that when it arises again, it may require re-examination and further consideration. But I do not appreciate how, in view of the provisions of clause 7 of section 19H of the Court-Fees Act, this Court reversed the decision of the primary Court in the case of *Collector of Maldah v. Nerode Kamini Dass* (1). I further find it difficult to follow how this Court could interfere in the determination of the question of the duty payable by an applicant for probate or letters of administration, upon even the

most liberal interpretation of the scope of section 115 of the Civil Procedure Code or section 15 of the Charter Act.

The next case to which my attention has been drawn is that of *In the goods of Ram Chunder Doss* (1). In this case, Sir Richard Couch C. J. held with the concurrence of Mr. Justice Markby, that in estimating the amount of the *advalorem* fee chargeable under clause 11 of the first schedule of the Court-Fees Act, the fee must be paid in respect of the property without deducting the amount of the debts to be paid out of it. The learned Chief Justice referred to the provisions of the law on the subject in England (55 Geo. III, C. 184, Sec. 51) and observed that the Court had not to make the law but to put a construction upon the language which the legislature had used. This decision, it will be observed was given in 1872, long before the amendment of the Court Fees Act in 1899, and the Court was called upon to consider only the question of the construction of Article 12 as it stood at the time. The Court accepted the contention of the Advocate-General that the duty was payable on the whole amount and overruled the argument of the applicant for letters of administration that the word "value" means "the value of the estate after debts have been deducted." It is not necessary to examine the grounds of this decision, as, in my opinion, the law has been materially altered by subsequent legislation. But before I leave this case, I may state that I do not appreciate how a reference under section 5 of the Court Fees Act by the Taxing Officer of this Court on the Original Side was heard by a Bench of two Judges. Section 5 makes it plain that such reference is to be heard by the Chief Justice or by such Judge of the High Court as the Chief Justice may appoint. *Khachera v. Kharag Singh* (2).

The other cases to which my attention has been drawn do not support the contention of the Board of Revenue. In the case of *In the goods of Peter Innes*, (3) it was ruled by Norman C. J., that when letters of administration are granted in respect of property subject to a mortgage, the value of the property, within the meaning of Article 11 of the first schedule of the Court Fees Act, is the value of the entire property less the amount of the incumbrance, because, this is the value of that with which the Administrator is to deal. The same view was accepted in *In the goods of Charles Edward Maclean* (4) where it

CIVIL.

1918.

In the goods of
Harriett Terlot Kerr,
deceased.

Mookerjee, J.

(1) (1872) 18 W. R. 168; 9 B. L. R. 30.

(2) (1910) 7 A. L. J. R. 842; 1, L. R. 28 All 20.

(3) (1871) 16 W. R. 253; 8 B. L. R. App. 48.

(4) (1874) 8 All H. O. R. 214.

CIVIL.

1918.

In the goods of
Harriett Tevlot Kerr,
deceased.

Mookenjee, J.

was held that the term "value" in Article 11 means "market value" and that the market value of mortgage property is the value of the equity of redemption and of that only. To the same effect is the decision of Westropp C. J., in *In the goods of Ramchandra Lakshmanji*, (1). These decisions clearly do not lend any support to the position taken up by the Board of Revenue. On the other hand, if we accept the interpretation of the term "value" as given in these cases, namely, "Market Value," the view may well be maintained that when probate is taken in respect of an estate out of which debts have to be paid, the value, that is, the market value, of the property is the value of the estate left after deduction of the amount of the debt. In essence, the estate is burdened with the payment of debts, and if the estate were put up to sale with the notification that whoever might purchase it, would have to pay thereout the debts of the deceased, a purchaser would pay for the property a proportionately reduced price. This, I venture to think, is a reasonable construction of the expression "value of the property" in Article 11, and if this interpretation had been adopted in the case of *In the goods of Ram Chunder Doss* (2), the complications which have followed would have been avoided. Whatever doubts, however, might have been entertained as to the true scope of Article 11 as it stood in 1870, the effect of the legislation of 1899 is in my opinion obvious and plainly supports the contention of the Administrator-General.

I hold accordingly that the duty in this case must be charged at the rate of two and one-half per centum on the sum which represents the difference between the gross value of the estate and the amount of the debts.

Messrs Leslie and Hinds.—Solicitors for the Administrator-General.

Government Solicitor for the Board of Revenue.

A. T. M.

Reference answered accordingly.

(1) (1876) 1 L. R. 1 Bom. 118.

(2) (1872) 18 W. R. 153.

APPELLATE CIVIL.

*Before Sir Cecil Brett, Knight, Judge, and Mr. Justice
Sharfuddin.*

KHIRODAMOYI DASI AND OTHERS

v.

ADHAR CHANDRA GHOSE AND OTHERS.*

*Appeal, if lies—Appeal against preliminary decree—Final decree, passing of,
before filing of appeal—Final decree signed after filing of appeal—Civil
Procedure Code (Act V of 1908), Sec. 97.*

CIVIL
1912
April, 24, 25, 30.

After the final decree has been made, whether or not an appeal has been preferred against the preliminary decree, it is the duty of the party aggrieved by the final decree to prefer an appeal against the final decree. An appeal therefore against the preliminary decree, after the passing but before the signing of the final decree, and without challenging by appeal the final decree, is useless and cannot be entertained.

Machensis v. Lala Narsingh Sahai (1) followed.

Section 97 of the Code of Civil Procedure does not relieve the person who appeals from the preliminary decree from the necessity of appealing against the final decree nor does it provide how, if the preliminary decree is contrary to the terms of the final decree, the final decree is to be interfered with after it has been allowed to stand without any appeal being preferred against it.

Appeal by the Plaintiffs.

Suit for partition.

A preliminary decree was passed directing partition of certain property, after upholding the contention of the defendant, on the 29th March, 1910. The lower Court proceeded to deal with the suit and, on the 19th April, the suit was called on for final disposal. On that date, neither the plaintiffs nor the defendants appeared and the result was that a final decree was passed dismissing the claim for partition. On the 20th April, 1910, the present appeal against the preliminary decree was preferred. The question was whether such an appeal was maintainable.

Babus Dwarka Nath Mitter, Amarendra Nath Bose, Bejoy Kumar Bhattacharjee and Manindra Nath Banerjee for the Appellants.

Dr. Rash Behary Ghose, Babus Golap Chandra Sarkar, Dwarka Nath Chakraverti and Bhudeb Chandra Roy and Mr. G. Sarkar for the Respondents.

The judgment of the Court was delivered by

Brett J.—This is an appeal against a preliminary decree passed in a suit brought by the present appellants for the partition

April, 30.

*Appeal from Original Decree No. 187 of 1910, against the decree of Babu Bidhu Bhushan Banerjee, Subordinate Judge, 2nd Court of Hooghly, dated the 29th March, 1910.

CIVIL,

1912.

Khirodamoyi Das

v.
Adhar Chandra.

Brett J.

of certain property which was alleged to be the property of a joint family consisting of the plaintiffs and the defendants other than the defendant No. 5. The defendant No. 5 is the mortgagee of one of the properties in suit and his case was that this property had been mortgaged to him by Adhar, the defendant No. 1, and his wife and that that property was the exclusive property of the defendant Adhar and his wife, and did not form a portion of the joint family property. This property is a house in Howrah and the other property of which it is sought to obtain a decree for partition is situated in Bantara. The contest in the suit, however, really centred round this house in Howrah and the efforts of the plaintiffs were directed to prove that this property was the joint property of the family whereas the defendant No. 5 contended that it was the exclusive property of the defendant No. 1 Adhar and his wife. The Subordinate Judge after taking evidence, came to the conclusion that this Howrah property was the exclusive property of the defendant No. 1 Adhar and his wife and, therefore, could not be included in the decree for partition. He, therefore, passed a preliminary decree in favour of the plaintiffs directing that they were entitled to obtain a partition of the Bantara property only. It is to be observed that the defendant No. 5 had, prior to this, brought a suit on his mortgage bond and had recovered a decree against the defendant Adhar and his wife and was seeking to sell the Howrah property in satisfaction of his decree. After the preliminary decree in the partition suit had been passed on the 29th March 1910, it was drawn up and signed on the 2nd April. The lower Court, after that, proceeded to deal with the suit and, on the 19th April, the suit was called on for final disposal. On that date, neither the plaintiffs nor the defendants appeared and the result was that a final decree was passed dismissing the claim for partition preferred by the plaintiffs. No order was given as to costs. This decree must be regarded as the final decree in the suit for partition and as covering not merely the Bantara property but also the property in Howrah, which was also included in the suit which the plaintiffs instituted. The plaintiffs not having appeared on the 19th April to take any action when the partition suit was called on for final disposal filed the next day, the 20th April, the present appeal against the preliminary decree which had been passed on the 29th March, 1910. No appeal whatever has been preferred against the final decree which was passed on the 19th April and appears to have been signed on the 26th April, 1910.

The learned pleader for the respondents has invited our

attention to the case of *M. H. Mackensie v. Lala Narsingh Sahai* (1) which was decided by this Court in March 1909. It was there held that the rule under which the right of appeal from interlocutory orders ceases with the disposal of the suit equally applies to cases of suits in which there is first a preliminary decree and afterwards a final decree. (The learned Judges in that case pointed out that, after the final decree has been made, whether or not an appeal has been preferred against the preliminary decree, it is the duty of the party attacked by the final decree to prefer an appeal against the final decree; otherwise, the position would be that, after the final decree has been passed and has been allowed to stand unchallenged by appeal and to become a final determination of the points in controversy between the parties in the suit, the decision in the appeal against the preliminary decree supporting it to be in conflict with the final decree could not be enforced, and, therefore, an appeal against the preliminary decree when the final decree had been allowed to remain unchallenged by appeal would be useless and could not be entertained.) We agree with the view taken by the learned Judges in that case. It has, however, been argued by the learned pleader for the appellants that, since that judgment has been passed, the law has been modified by section 97 of the new Code of Civil Procedure. (Section 97 runs thus:—"Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.") That section does not, however, relieve the person who appeals from the preliminary decree from the necessity of appealing against the final decree nor does it provide how, if the preliminary decree is contrary to the terms of the final decree, the final decree is to be interfered with after it has been allowed to stand without any appeal being preferred against it.) In this case, the plaintiffs had, no doubt, a right to present an appeal against the preliminary decree, but they were not right in the course which they have adopted with reference to this final decision of the suit. They must have been perfectly aware of the date fixed for the final decision and, instead of appearing then and either contesting it or asking for a postponement in order to appeal against the preliminary decree, they allowed the final decree to be passed dismissing the suit for default and now they have come, though

CIVIL.

1912.

Khirdamoyi Dasi

Adhar Chandra.

Brett J.

(2)

CIVIL.

1912.

Khirodamoyi Das

v.
Adhar Chandra.

Brett J.

by the final decree the whole suit has been dismissed, to ask this Court to interfere with the preliminary decree. In our opinion, we are unable to entertain the appeal or to deal with it when it has been preferred after the final decree has been passed and at a time when that final decree stands unquestioned. The learned pleader for the appellants suggests that, because the final decree was not actually signed till the 26th April, his clients were justified in presenting the present appeal on the 20th April. We do not think that there is any substance in this contention. Under the law, the decree bears the same date as the judgment. The course which the plaintiffs appear to have adopted in the present case, in our opinion, raises very grave doubts whether the suit which was brought in the form of a suit for partition was really a suit the intention of which was to obtain any relief by way of partition or whether, on the other hand, it was not a suit to obtain a cheap decision on a question of title. However, we have nothing to do with that question in the present appeal and we hold that, as the present appeal was preferred after the final decree had been passed and as that final decree still stands unquestioned, unchallenged on appeal the present appeal must fail. The appeal is accordingly dismissed with costs to the contesting defendant respondent Prodyot Coomer Addy. In the circumstances of the case, we allow one-half of the hearing fee allowed by the rules of the Court.

The result necessarily follows that the injunction issued by this Court must be withdrawn.

A. T. M.

Appeal dismissed.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice,
and Sir Asutosh Mookerjee, Knight, Judge.*

MAHARAJA MANINDRA CHANDRA NANDI

v.

JAGANNATH KHAN.*

CIVIL.

1912.

June, 19.

Enhanced rent, claim for—Contract—Garden and bastu land—Garden converted into bastu land—Tenant, if liable to pay fair rent.

It was stipulated in a contract by which garden and bastu lands, were let out, that if any of the garden was converted into bastu land, the rent

* Letters Patent Appeal No. 41 of 1912, under section 15 of the Letters Patent, against the decision of Mr Justice Coxe, dated the 19th March, 1912, in Appeal from Appellate Decree No. 99 of 1910, against the decree of Babu Bam Charan Mullick, Subordinate Judge of Nuddea, dated the 4th October, 1909, modifying that of Babu Tarapada Chatterjee, Munsiff, 2nd Court of Krishnagar, dated the 11th February, 1909.

on it should be raised from Rs. 5 to Rs. 10 per bigha. The whole land was converted into *bastu*. In a suit brought for realisation of rent at the rate of Rs. 20 per bigha :

Held, that the suit was governed by the contract between the parties and the tenant was not liable to pay either a fair rent or a customary rent or a prevailing rent or indeed any rent except that which he covenanted to pay.

Appeal by the Plaintiff.

Suit for rent at an enhanced rate.

The material facts appear from the judgment of Mr. Justice Coxe.

The appeal came on for hearing before Mr. Justice Coxe on the 15th March 1912.

Dr. Rash Behary Ghose, Babus Ram Charan Mishra, Jogesh Chunder Dey and Hemendra Nath Sen for the Appellant.

No one for the Respondent.

C. A. V.

The following judgment was delivered by

Coxe J.—The plaintiff's predecessor in interest let the land in suit to one Mr. Marton at the rent of Rs. 40-4 *sicca*. It consisted of garden and *bastu* land and it was stipulated that if any of the garden was converted into *bastu* land the rent on it should be raised from Rs. 5 to Rs. 10 a bigha. There was also a stipulation for payment of rent on excess land. The plaintiff alleged that the whole land had been converted into *bastu*, that there was a growing custom that such lands should bear a rent of Rs. 20 a bigha, and asked that the land should be measured and a decree for rent given him at the rate of Rs. 20 a bigha for the area found by measurement.

The defendant is the present tenant of the land.

The learned Subordinate Judge found that the area had not increased, that the garden land except an area of 1 bigha 8 cottahs had been converted into *bastu*, and gave the plaintiff a decree in accordance with the rates stipulated in the *kabuliāt*.

The plaintiff appeals. It is first argued on his behalf that a decree should be given at an enhanced rate, as there is no stipulation in the *kabuliāt* against enhancement. It is said that it is not proved or found that the landlord cannot eject the defendant; and if he has the power to eject *a fortiori* he must have the power to enhance. It seems to me however that the case must be governed by the contract between the parties and I can see no reason why, in a case not coming under the Tenancy Act and in which there is no special stipulation for enhancement, the tenant should pay or be compelled to pay

CIVIL.

1912.

Mahendra Chandra
Jagannath Khan

1912.

March, 19.

CIVIL,

1913.

Manindra Chandra

Jagannath Khan.

Coxe, J.

either a fair rent, or a customary rent or a prevailing rent, or indeed any rent except that which he has covenanted to pay. No doubt the landlord may terminate a lease, if he is entitled to do so, and may thereafter settle the land at a higher rent or refuse to let the tenant continue to hold the land unless he agrees to pay more, or perhaps he might sue thereafter for damages for use or occupation and obtain damages calculated on the rent that he could have obtained for the land, if the tenant had not been in possession. But during the continuance of the tenancy, he cannot get more than the tenant has contracted to pay. This was held in *Ranee Lalimones v. Rajah Ajoodhya Ram Khan* (1) which was followed in *Kylash Chunder Sircar v. Woomanund Roy* (2) and *Krishna Kant Saha v. Krishna Chandra Roy* (3).

It has also been contended that the learned Subordinate Judge has erred in holding that an area of 1 bigha 8 cottahs still remains as garden, and that the standard of measurement is a *rassi* of 55 yards. But neither of these findings, in my opinion, is open to attack in second appeal.

The appeal must be dismissed but as no one has appeared on behalf of the respondent to argue the case, I do not allow costs.

Against this decision, the plaintiff appealed under section 15 of the Letters Patent.

Babu Ram Charan Mitra (with him *Dr. Rash Behary Ghose, Babis Foges Chunder Dey* and *Hemendra Nath Sen*) for the Appellant.

Babu Hara Prasad Chatterjee for the Respondent.

June, 18.

Jenkins C. J.—There is really nothing to be said in favour of this appeal. The judgment of Mr. Justice Coxe is in every respect correct, and we dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

(1) (1874) 23 W. R. 61.

(2) (1875) 24 W. R. 412.

(3) (1901) 9 O. W. N. 803.

*Before Sir Lawrence Jenkins, K.C.J.E., Chief Justice,
and Sir Asutosh Mookerjee, Knight, Judge.*

TRIBENI PROSAD SINGH AND OTHERS

v.

SHEIKH BASIRUL MEAH.*

*Damages, suit for—Maintainability—Obstruction in erection of Kutchery—
Loss of goods—Negligence.*

CIVIL.

1913.

June, 8.

In consequence of encroachment of the river Ganges, the land on which the plaintiffs' *kutchery* stood was threatened with diluvion. The *kutchery* contained grain and other goods. When the river after some two years came very near the *kutchery*, the plaintiffs attempted to erect another *kutchery* on another land belonging to them. The defendants however obstructed them in the construction of the new *kutchery*. The plaintiffs thereupon brought a suit for damages for loss of their goods but not for trespass:

Held, that the suit was not maintainable, as the loss was attributable not to the defendants but to the wanton negligence of the plaintiffs.

Appeal by the Plaintiffs.

Suit for damages for wrongful acts of the defendants.

The material facts appear from the judgment of Mr. Justice Chitty. The appeal came on for hearing before Mr. Justice Chitty on the 27th July, 1911.

Babus Jogesh Chandra Roy and Kheira Mohan Sen for the Appellants.

Moulvi Muhammad Mustafa Khan for the Respondents.

C. A. V.

The following judgment was delivered by

Chitty J.—In this suit the plaintiffs sought to recover a sum of Rupees 1,084-15-0 as damages alleged to have been sustained by them in consequence of the wrongful acts of the defendants. The Munsiff passed a decree in favour of the plaintiffs for Rs. 506-4-0 against some of the defendant's. The District Judge has reversed that decision and dismissed the plaintiffs' suit. The plaintiffs have appealed to this Court valuing the appeal at Rs. 506-4-0. The case of the plaintiffs as set out in their plaint was that in consequence of the encroachment of the river Ganges the land on which their *kutchery* stood was threatened with diluviation. The *kutcherry* contained grain and other goods, the property of the plaintiffs. When the river after some two years came very near the *kutchery* the plaintiffs attempted to

1911.

July, 29.

* Letters Patent Appeal No. 156 of 1911 under section 15 of the Letters Patent, against the decision of Mr. Justice Chitty, dated the 29th July, 1911, in Appeal from Appellate Decree No. 48 of 1910, against the decree of M. K. Deb, Esq., officiating District Judge of Bhagalpur, dated the 1st October 1909, reversing that of Babu Parash Chandra Banerjee, Munsiff of Moughyr, dated the 28th April, 1909.

CIVIL.

1918.

Tribeni Prasad

v.

Sheikh Basirul Meah.

O'Malley, J.

erect another *kutchery* on a neighbouring *dih* or high piece of land also belonging to them. The defendants however not only resisted them in construction of the new *kutchery* but also prevented them from removing the grain and other goods from the old *kutchery*, with the result that the *kutchery* with its contents was washed away by the river in August 1908, and the goods of the value stated lost to the plaintiffs. This story is however negatived by the findings of both the Courts. The plaintiffs were in no way interfered with by the defendants with regard to the removal of the goods from the old *kutchery*. All that the defendants did was to obstruct the plaintiffs in building a new *kutchery* on the *dih*, laying claim to that land as their own. It has been found that that land belongs to the plaintiffs, and the defendants' action in resisting them in their building operations was a trespass. If the defendants had wrongfully prevented the plaintiffs from removing their goods from the old *kutchery* when it was known that the river was encroaching and there was imminent danger of the *kutchery* and its contents being washed away, the plaintiffs might have had some case against the defendants. As it was, the trespass of the defendants on the other land of the plaintiffs was only very remotely connected with the loss of the goods. It was certainly not (to use Sir Frederick Pollock's expression) the "decisive" cause of such loss, nor was the loss the natural and probable consequence of the trespass. Even the finding of the Munsiff appears to put the plaintiffs out of Court. He says "it is true that the plaintiffs' men might have removed the grains before the 9th from the *kutchery*. It may also be conceded that a man of ordinary prudence should have done so before the 9th and again, "The unexpected resistance offered by the defendants to the erection of the new *kutchery* and the appearance of the Police officers on the scene greatly disturbed the minds of the servants of the plaintiffs and prevented them from paying any attention to the matter of the removal of the "things." The District Judge finds that the loss was due to the want of care and negligence of the plaintiffs' men. It is clear that the plaintiffs might easily have removed their goods in time. The loss of the goods cannot be ascribed to any wrongful act of the defendants, and the plaintiffs have therefore no cause of action against the defendants in this respect. I am of opinion that the judgment of the District Judge is correct, and accordingly dismiss the appeal with costs.

Against this decision, the plaintiffs appealed under section 15 of the Letters Patent.

Babus Jogesh Chandra Roy and Khettar Mohan Sen for the Appellants.

Moulvi Muhammad Tahir (for *Moulvi Muhammad Mustafa Khan* for the Respondents.

The judgment of the Court was delivered by

Jenkins C. J.—The answer to the plaintiffs' claim is that they have sued not for trespass on their land but for loss of their goods caused by the defendants. In my opinion, that case cannot stand in view of the findings of the lower appellate Court, because the loss, according to these findings, is attributable not to the defendants but to the wanton negligence of the plaintiffs' men. Had the suit been otherwise framed, it is quite possible that the plaintiffs would have succeeded, at any rate to the extent of the trespass on the land, but that is not the case with which they came to Court.

For these reasons, I would dismiss this appeal with costs.

A. T. M.

Appeal dismissed.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

BHOWANI MISSER AND OTHERS

v.

PEARI JHA AND ANOTHER.*

Promise to pay barred debt—Promise in writing and signed by debtor—Knowledge of debt barred, if necessary—Contract Act (IX of 1872), Sec. 25 cl. (3).

A promise to pay a barred debt made in writing and signed by the person charged therewith is enforceable. It is not necessary for the creditor to establish that at the time when the promise was made by the debtor, the debtor knew that the debt which he promised to pay wholly or in part was a debt of which the creditor could not enforce payment by reason of the law for the limitation of suits.

Appa Rao v. Suryaprakasa Rao (1) and *Muti Sheikh v. Baikantha* (2) followed †

Ramaswami v. Kuppuswami (3) dissenting from.

*Appeal from Appellate Decree No. 128 of 1911, against the decree of H. Allanson, Esq., District Judge of Dumka, dated the 12th December, 1910, affirming that of A. W. Stark Esq., Subordinate Judge of Godda, dated the 20th September, 1910.

† See *Ganapathy Moodelly v. Unnikrishnan Moodelly* (1909) I. L. R. 33 Mad. 159—Rep.

(1) (1890) I. L. R. 23 Mad. 94.

(2) (1913) 18 C. L. J. 289

(3) (1910) 20 M. L. J. 650.

CIVIL.

1918.

Tribenl. Proceed.

c.

Sheikh Basmul Meah.

Okilly, J.

June 6.

CIVIL.

1918.

August, 12.

CIVIL.

1918.

Bhowani Misser

v.

Pearl Jha.

Appeal by the Plaintiffs.

Suit for recovery of money due on an instalment bond.

The defence was that there was no consideration for the bond. The bond recited that on the 18th May 1896 the predecessors of the defendants had borrowed money from the plaintiffs and executed a bond in their favour, that on adjustment of accounts, after deduction of the amount remitted and paid and set-off allowed, a sum of Rs. 800 was found due by the debtor up to 8th June, 1906, and that as he was then unable to pay the said amount, on his entreaty the creditor had agreed to receive the sum on certain specified instalments. The debtor then expressly agreed to pay Rs. 800 according to the instalments mentioned in the schedule. The case for the defendants was that on the 8th June 1906 the sum due on the bond of the 18th June 1896 was not recoverable, as the claim was barred by limitation, and that consequently there was no consideration for the bond in suit. Effect was given to this contention by both the Court below and the suit was dismissed.

Babus Mahendra Nath Roy and Lal Mohan Gangooly for the Appellants.

Babu Lakshmi Narain Singh for the Respondents.

The judgment of the Court was delivered by

August, 12.

Mookerjee J.—This is an appeal by the plaintiffs in a suit for recovery of money due on an instalment bond executed in their favour by the defendants on the 8th June 1906. The claim was resisted on the ground that there was no consideration for the bond. Effect has been given to this contention by both the Courts below.

The bond recites that on the 18th May 1896 the predecessors of the defendants had borrowed money from the plaintiffs and executed a bond in their favour, that on adjustment of accounts, after deduction of the amount remitted and paid and set-off allowed, a sum of Rs. 800 was found due by the debtor up to the 8th June 1906, and that as he was then unable to pay the said amount, on his entreaty the creditors had agreed to receive the sum on certain specified instalments. The debtor then expressly agreed to pay Rs. 800 according to the instalments mentioned in the schedule. The case for the defendants now is that on the 8th June 1906 the sum due on the bond of the 18th June 1896 was not recoverable, as the claim was barred by limitation, and that consequently there was no consideration for the bond in suit. On behalf of the plaintiffs, reliance is

placed upon clause (3) of section 25 of the Indian Contract Act. That clause provides as follows; "An agreement made without consideration is void, unless it is a promise made in writing and signed by the person charged therewith to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for limitation of suits." In the case before us, there is plainly a promise made in writing and signed by the person sought to be charged therewith. The promise is to pay a debt. The contention on behalf of the debtor is that the debt was one of which the creditor might have enforced payment but for the law for the limitation of suits. Assuming that this contention is well-founded, it is clearly of no assistance to the debtor, if, notwithstanding that the debt was of the description he alleges, the agreement was valid under clause (3) of section 25 of the Indian Contract Act. But it has been argued that in order to bring the case under clause (3) of section 25, it is necessary for the creditor to establish that at the time when the promise was made by the debtor, he knew that the debt which he promised to pay wholly or in part was a debt of which the creditor could not enforce payment by reason of the law for the limitation of suits. In our opinion, there is no foundation for this contention. To support the argument, it is necessary to read into the section words which are not to be found there. If the Legislature had intended clause (3) to have the operation attributed to it by the respondent, the Legislature might well have used the phrase "to pay wholly or in part a debt which, the debtor was aware, was such as the creditor could not enforce by reason of the law for the limitation of suits." The words used by the Legislature cannot obviously be amplified in this manner. The view we take is supported by the decisions in *Appa Rao v. Suryaprakasa Rao* (1) and *Mati Sheikh v. Baikantha Nath Kar* (2) where this Court declined to follow the dictum in *Ramaswami v. Kuppuswami* (3).

The result is that this appeal is allowed, the decrees of the Courts below set aside and the suit decreed with costs in all the Courts. There will be a decree in favour of the plaintiffs for Rs. 1019 with interest at the rate of six per cent. per annum from the date of the institution of the suit up to the date of realization.

A. T. M.

Appeal allowed.

(1) (1899) I. L. R. 28 Mad. 94.

(2) (1913) 30 O. L. J. 260

(3) (1910) 30 M. L. J. 656.

CIVIL.
1913.
Bhowani Misser
v.
Pearl Jha.
Mookerjee J.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.

SARODA KUMAR ROY AND ANOTHER

v.

JAGABANDHU SAHA AND OTHERS.*

CIVIL.

1913.

May, 28.

*Ejectment, suit for—Purchaser at revenue sale—Documents creating tenures—
Some protected—Lands not protected mixed with lands protected—Decree
for joint possession.*

The purchasers at a revenue sale sued for recovery of certain lands as included in the estate. The defendants resisted the claim on the ground that they held the disputed lands as tenures-holders and that the tenures existed from before the time of the Permanent Settlement. They relied on four deeds in support of their claim. It was found that the two earlier deeds of 1789 and 1803 created valid tenures which existed from the Permanent Settlement: that the documents of 1835 and 1842 were conveyances of portions of the parent estate and did not create tenures that were protected at a revenue sale. The two earlier *kobalas* described the lands covered by them as *mudafats* A and B. But the two later *kobalas* not only mentioned those *mudafats* but also two other *mudafats*. The defendants were in possession for a long series of years without maintaining any distinction between the several *mudafats* and it could not be ascertained which plot belonged to which *mudafat*.

Held, that the plaintiffs were entitled to joint possession with the defendants.

Appeal by the Defendants.

The material facts are stated above.

Babu Dwarka Nath Chakravarti and *Dr. Sarat Chandra Basak* for the Appellants.

Babu Satis Chandra Ghose for the Respondents.

The appeal came on at first for hearing on the 27th March 1911 before Mr. Justice Coxe, who delivered the following judgment.

Coxe J.—The plaintiffs, in this suit, are purchasers at a sale for arrears of revenue and sue for recovery of certain lands as included in the estate. The defendants pleaded that the lands were covered by tenures dating from the Permanent Settlement and were consequently protected.

The case came up to this Court in 1907 and it was then held that the two documents of 1789 and 1803 created valid tenures which might be regarded as existing from the Permanent Settlement. The documents of 1835 and 1842 were held

* Letters Patent Appeal No. 98 of 1911 under section 15 of the Letters Patent, against the decision of Mr. Justice Coxe, dated the 8th April, 1911 in Appeal from Appellate Decree No. 124 of 1909, against the decree of Babu Pran Krishna Biswas, Subordinate Judge, 2nd Court at Dacca, dated the 23rd September 1908, modifying that of Babu Baroda. Prosad Rai, Munsiff, 3rd Court at Dacca, dated the 30th June, 1908.

1911.

April, 3.

to be conveyances of portions of the parent estate, and not to create tenures that would be protected at a revenue sale. Accordingly the case was remanded and the Subordinate Judge was directed to give the plaintiff a decree for the land covered by the documents of 1835 and 1842 and to dismiss the suit so far as it related to lands covered by the two earlier documents. The possibility, that the documents might overlap, appears not to have been considered.

The Subordinate Judge has found that the later documents cover *mudafats* Radha Madhab Goswami, Manohar Bose, Ram Kanai De and Ajudhya Ram Daibanga, while the earlier ones cover Radha Madhab Goswami and Manohar Bose. The area of these two amounts to 1 khada 12 pakhis or $\frac{1}{11}$ ths of the whole area of 2 khadas 6 pakhis covered by the later documents. The Subordinate Judge finding that the defendants have been in possession for a long series of years without maintaining any distinction between the several *mudafats* and that it is impossible to say which plot belongs to which *mudafat*, has given the plaintiff a decree for joint possession of $\frac{1}{11}$ ths of the land in dispute.

The plaintiff appeals and it is argued on his behalf that when the Subordinate Judge found that the lands were covered by the later documents, he was bound by the remand order to give the plaintiff a decree, whether a portion was covered by the earlier documents or not. It is also argued that some of the plots said to be covered by the earlier documents are not so covered, but that is a point that cannot, in my opinion, be taken at this stage.

I do not think that the Subordinate Judge has, in any way, transgressed the remand order, but it seems to me that on his findings of fact, the plaintiffs are entitled to a decree. As regards *mudafats* Ram Kanai Dey and Ajudhya Ram Daibanga, they are clearly entitled. As regards the other two the facts now found by the Subordinate Judge read with the remand order establish that the defendants held tenures of these *mudafats* but that in 1835 or 1842 they acquired the proprietary right. That being so, their tenures were extinguished. There is some conflict of judicial opinion on this point, but the balance of authority is certainly in favour of this view. The latest case on the subject so far as I know, is *Ulfa' Hossain v. Gayani Dass* (1). If this view is correct, the plaintiffs are certainly entitled to a decree.

CIVIL

1918

Saroda Kumar

v.

Jagabandhu Saha.

Appeal, J.

CIVIL,

1911.

Saroda Kumar

Jagabandhu Saha

Coxe, J.

Accordingly, the appeal will be allowed and the order of the Munsiff restored with costs of all Courts.

Against this decision, the defendants appealed under section 15 of the Letters Patent.

Babus Baidya Nath Dutt and *Sitis Chandra Ghose* for the Appellants.

Babu Dwarka Nath Chakravarti and *Dr. Sarat Chandra Bysack* for the Respondents.

The judgment of the Court was delivered by

May, 28.

Jenkins C. J.—The judgment of Mr. Justice Coxe is opposed to the earlier judgment of Mr. Justice Rampini, and we do not think it is in accordance with law. We therefore, set aside that judgment and restore the decree of the Subordinate Judge. The respondent must pay the costs of this appeal and the costs before Mr. Justice Coxe.

A. T. M.

Appeal allowed.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

SARBANANDA NATH BHOWMICK AND OTHERS

v.

RANA GAZI AND OTHERS.*

CIVIL

1911.

May, 30.

Ejectment, suit for—Putni Regulation (VIII of 1819), Sec. 11, cl. (3)—'Resident and hereditary cultivator'—Engagement with Darputnidar.

A purchaser of a *putni* cannot under clause (B) of section 11 of the Putni Regulation, eject resident and hereditary cultivators, though they came to certain arrangements embodied in a *pattah* which professed to be a grant of *miras* rights by the *darputnidar*.

Appeal by the Plaintiffs.

Suit for ejectment.

The defendants were resident and hereditary cultivators. Their grandfather cultivated the land and it was found as a fact that they were cultivating it at the date of the suit. Their homestead was on the land itself and they inherited it from their grandfather. They entered into certain arrangements embodied in a *pattah* which professed to be a grant of *miras* rights by the *darputnidar*. The contention of the plaintiffs was that the pro-

* Letters Patent Appeal No. 86 of 1911, under section 15 of the Letters Patent, against the decision of Mr. Justice Coxe, dated the 24th March, 1911, in Appeal from Appellate Decree No. 1587 of 1909, against the decree of J. N. Roy, Esq., officiating District Judge of Tipperah, dated the 27th April, 1909, modifying that of Moulvi H. N. Ahmed, Munsiff, 5th Court at Comilla, dated the 7th August, 1906.

tection given by clause (3) of section 11 of the Putni Regulation extended only to persons who were resident and hereditary cultivators and nothing else.

The appeal first came to be heard by Mr. Justice Coxe.

Babu Harendra Narayan Mitter for the Appellants.

Moulvi Syed Shamsul Huda, Babus Satish Chunder Ghose and Smritis Chunder Ghose for the Respondents.

The following judgment was delivered by

Coxe J.—This was a suit by the purchasers of a *putni* to eject the defendants and the only question that arises in this appeal is whether the defendants are protected from ejectment by section 11, clause 3 of the Putni Regulation of 1819. That clause provides that the purchaser of a *putni* shall not be entitled to eject *khodkast* raiyats or resident and hereditary cultivators, nor to cancel *bonafide* engagements made with such tenants by the late incumbent. There can be no doubt that the defendants are resident and hereditary cultivators. Their grandfather cultivated the land and it is found as a fact that they are still cultivating it. Their homestead is on the land itself and they have inherited it from their grandfather. So the fact that they are resident and hereditary cultivators cannot be disputed. It is argued, however, that the protection given by the clause cited is extended only to persons who are resident and hereditary cultivators and nothing else, and it is urged on behalf of the plaintiffs appellants that the defendants in this case, besides being resident and hereditary cultivators, are also *seputnidar* having obtained a *miras pottah* which is equivalent to a *seputni* from the former *darputnidar*. The *miras pottah* has been printed. By it the land in suit which amounts to 6 kanis 15 gundas was settled with the defendants' predecessor-in-interest at a *jama* of Rs. 31-8. It must be admitted that there are several stipulations in this *miras pottah* which are very unusual in leases to ordinary cultivating raiyats. There is a provision that the arrears of rent will be realised by sale under the Putni Regulation and Act X of 1859. Police duties are imposed upon the tenants as also expenses relating to construction of bridges and supplies to troops. Further there is a stipulation as to the up-keep of road, cattle-tracks and water-courses which are said to exist in this area of 6 kanis. But admitting that these stipulations are very unusual in leases to cultivating raiyats, it is I think quite as unusual, if not more so, that a *seputni* should be given, not for the collection of rents from under-tenants, but for the actual personal cultiva-

CIVIL.

1918.

Sarbananda

Bana Gazi.

1911.

April, 24.

CIVIL.
 1918:
 Sarbananda
 c.
 Bana Gani.
 Cose, J.

tion of a small piece of land such as is covered [by this *pottah*. Putnies and the like, so far as my experience goes, are usually and I believe invariably, tenures that is to say, tenancies in which the tenure-holder has under him under-tenants from whom he collects rents. And although these provisions in the *miras pottah* are certainly unusual there is nothing unlawful in requiring a mere raiyat to undertake the duties which are herein imposed. I am not prepared to say that this *miras pottah* amounts to a *seputni*. Nor am I prepared to say that the words "resident and hereditary cultivators" in the clause to which I have referred cover only such persons as are resident and hereditary cultivators and nothing else.

The second point taken is that the words in the clause "nor to cancel *bonafide* engagements made with such tenants by the late incumbent" should be read with the preceding words 'resident and hereditary cultivators' and it should be held that only such resident and hereditary cultivators are protected as have entered into engagements with the previous incumbent of the *putni* and not those who have entered into engagements not with the former *putnidar*, but with subordinate *darputnidars*. I do not think that this can at all be the meaning of the clause which clearly disentitles a purchaser of a *talook* to eject any resident and hereditary cultivator. The clause prohibiting him from cancelling *bonafide* engagements made with such tenants by the late incumbent is quite separate from the clause prohibiting him from ejecting them.

Thirdly, it is argued that the raiyati interest of the defendants has merged in the superior interest given them by the *miras pottah*. As I have said I am not prepared to say that the *miras pottah* has given them any interest superior to that of a raiyat at fixed rates. But even if it were so I do not think that the doctrine of merger has any application. The cases in which the doctrine of merger usually applies are cases in which there are conflicting interests of a superior and inferior character, such as the interests of a landlord and tenant. In such a case it is absurd to say that the tenant is bound to pay rent to the landlord when the landlord and tenant are one and the same person and therefore the right of tenant may well be said to have merged in that of the landlord. Such was the case of *Raja Kishendatt Ram v. Raja Muntaz Ali Khan* (1) where it was said, the relationship of landlord and tenant subsisted between

(1) (1879) 1 L. R. 5 Cal. 198.

the usufructuary mortgagees and the 'birt' tenure-holders. But in a case like the present where no inconsistency in the rights arose but all that had happened was that the *raiya*t obtained a greater fixity of tenure I think no question of merger can arise. On the findings of fact of the Court below, it seems to me that the defendants are resident and hereditary cultivators within the meaning of section 11 of Putni Regulation of 1819 and the plaintiffs are not entitled to eject them. The appeal is dismissed with costs.

Against this decision, the plaintiffs preferred an appeal under section 15 of the Letters Patent.

Babu Harendra Narayan Mitter for the Appellants.

Babus Ram Chandra Moxumdar, Satis Chunder Ghose and Smritis Chunder Ghose for the Respondents.

The judgment of the Court was delivered by

Jenkins C. J.—In this case all the Courts decided against the appellant. In my opinion they have decided rightly and I fail to follow the line of reasoning by which it is suggested that a man who was a *khudkasht raiya*t ceased to hold that position, because he came to certain arrangements embodied in a *pottah* which professed to be a grant of *miras* rights by the *darputnidar*. The matter appears to be clear beyond argument, and we dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and Sir Asutosh Mukherjee, Knight, Judge.

SIBA PROSAD SAMANTA AND OTHERS

v.

GOSSAIN DAS DUTT AND ANOTHER.*

Poolbundi charges—Putni lease—Contract—Apportionment of charge by Collector—Contractual right, if can be enforced—Suit for declaration and injunction, if maintainable—Contract, if valid—Bengal Embankment Act (II B. C. of 1882), Secs. 54, 56, 59, 68, 69, 74—Embankment Act at the time of contract, repeal of.

The Collector has no power under the Bengal Embankment Act to take away from the *putnidar*, the benefit of any contractual right which he had

* Letters Patent Appeal No. 96 of 1911, under section 15 of the Letters Patent, against the decision of Mr. Justice Coxe, dated the 7th April, 1911, in Appeal from Appellate Decree No. 2071 of 1909, against the decree of Babu Ambica Charan Mukerjee Subordinate Judge, 1st Court, of Midnapur, dated the 12th July, 1909, modifying that of Babu Lal Behari Chatterjee, Munsiff, 4th Court, of Midnapur, dated the 9th December, 1908.

CIVIL.

1913

Sarbananda

Bana Gazi.

Coxe, J.

May, 30.

CIVIL.

1913.

June, 11, 12.

CIVIL.

1918.

Siba Prasad
v.
Gossain Das.

against the zemindar and the *putnidar* is entitled to come to the civil Court for the purpose of having his contractual rights vindicated.

There was a stipulation in the *putni* lease that the zemindars should pay the *poolbundi* cesses. Embankment charges were assessed by the Collector under the Bengal Embankment Act, 1882 and had been apportioned on the *putnidars*. The *putnidars* brought a suit for a declaration that they were not bound to pay those charges and that the orders of the Collector could not be enforced and for an injunction against the zemindars from realising those charges from them :

Held, that the suit was maintainable, as there was reason to apprehend the breach of the contract on which the plaintiff relied.

The *poolbundi* charge in the case was so similar to that which would have been in existence at the time of the *putni* lease in 1870 that it was within the intention of the parties to include such *poolbundi* and it would be fair to extend the agreement to the particular charge arising under the Act of 1882.

There is nothing in the Act of 1882 that would render the agreement contrary to the policy of the law or void for any other reason.

Appeal by the Plaintiffs.

Suit for a declaration that the plaintiffs *putnidars* were not bound to pay *poolbundi* charges and that the orders of the Collector could not be enforced and for an injunction against the defendants, zemindars from realising those charges from them.

The material facts are stated above.

The appeal first came to be heard by Mr. Justice Coxe.

Babu Joy Gopal Ghosha for the Appellants.

Babu Nanda Lal Banerjee for the Respondents.

The following judgment was delivered by

Coxe J.—The plaintiffs in this case are *putnidars* under the defendants respondents and there is a stipulation in the *putni* that the zemindars shall pay the *poolbundi* cesses. Embankment charges were assessed by the Collector under the Bengal Embankment Act, 1882, and have been apportioned on the plaintiffs as *putnidars*. The plaintiffs have brought this suit for a declaration that they are not bound to pay these charges and that the orders of the Collector cannot be enforced and for an injunction against the defendants from realizing these charges from them. The suit was decreed by the Munsiff but dismissed, on appeal, by the Subordinate Judge. The plaintiffs appeal to this Court.

Under section 54 of the Bengal Embankment Act, the whole sum assessed as Embankment charges is payable to the

1911.

April, 7.

Collector by the zemindars of the estates benefited. Under section 55, every zemindar is entitled to recover from the tenure-holders under him the sums apportioned to those tenures under section 59. This apportionment is made by the Collector after notice has been given under section 56 that an enquiry will be held for the purpose of apportioning amongst the zemindars and the tenure-holders the sums so payable; and section 59 enacts that the Collector shall charge or apportion the amount payable in respect of each estate upon the holders of the tenures therein rateably in the proportion of benefit received. When the apportionment has been completed, the Collector under section 68, makes an order specifying the estates and tenures in respect of which the sums charged or apportioned are payable; and, when that has been done, the Collector, under section 69, causes a copy of the said order to be published with a notice that the amounts apportioned on the tenure-holders are payable to the zemindars. Taking all these sections together, it is quite clear that the Collector is authorized to assess the Embankment charges on tenures after due notice and that the tenure-holders are bound to pay those sums to the zemindars. There is no means by which Government can recover those charges from the tenure-holders.

The first point taken on behalf of the appellants is that the Collector's orders apportioning the embankment charges on tenure-holders, must be subject to any contract, made between the tenure-holders and the zemindars; and that, if such an order is contrary to any such contract, it is a nullity. It is said that all these orders of the Collector must be construed as being passed on the assumption that there is no contract to the contrary. There is certainly nothing in the Act to support this view and I should have expected that, if this had been the intention of the legislature, suitable words would have been introduced, to indicate that the Collector's proceedings were subject to contracts between the parties. And that it was not the intention of the legislature to make these orders so subject to contracts between the parties may be inferred from the arguments contained in the judgment of the Collector dated 5th July 1904 on the objection of the present plaintiffs to pay the charges. The Collector pointed out in that order that a contract of this nature might conceivably make the superior estate insolvent, unable to pay the charges itself, and unsaleable for arrears of such charges. In such a case, as the Government could not recover the charges from the tenure-holders, the

CIVIL.

1918

Siba Prasad

Gosain Das.

Coco, J.

CIVIL

1918.

SILS. Prasad

v.

Gomai Das,

Coke, J.

result would be that they would not be collected at all. On these considerations, I am not at all prepared to accept the plaintiff's contention that, if the Collector's order under section 68 conflicts with a contract between the parties, it must be regarded as a nullity.

Secondly, it is argued that the plaintiffs do not desire that the Collector's order should be set aside but merely that it should not be enforced as against them. This distinction is somewhat too fine for my appreciation. It seems clear that, if these embankment charges cannot be realized in accordance with the Collector's order, the Collector's order is, to all practical intents and purposes, set aside.

Thirdly, it is argued that the matter is concluded by the doctrine of *res judicata*; but I do not think that that contention can possibly succeed. The decision of the High Court which laid down that the zemindars would be bound to pay the *poolbandi* charges was passed in Appeal from Appellate Decree No. 920 of 1880 and could not possibly conclude the defendants in this case from pleading that they are not bound to pay the embankment charges assessed under an Act which had not been passed at the time of the previous decision.

The fourth point taken is that the civil Courts are entitled to give relief under section 54 of the Specific Relief Act and that the present is a suitable case in which such relief should be given. No doubt, the Courts have such powers; but it appears to me that section 86 of the Embankment Act prevents any decree being given to the plaintiffs in the present case. That section enacts that orders passed under section 68—(and I have no doubt whatever that the order now under criticism was passed under section 68)—shall be final and not liable to be modified or altered otherwise than as expressly provided in this section. I do not see that any advantage is gained by twisting the simple words of a statute and making them mean the precise opposite of what they appear to mean. I cannot hold that orders passed under section 68 are not final or are liable to be modified or altered at its discretion by a civil Court under section 54 of the Specific Relief Act. The words seem to me to be perfectly simple and they cannot be evaded in this case without doing violence to the English language.

The view of the learned Subordinate Judge that a decree in favour of the plaintiffs would interfere with the public duties of the Embankment Collector has been criticized and it may

not perhaps be sustainable. The effect of the orders of the Embankment Collector is that the *putnidars* shall pay the charges to the zemindars and, if these charges are not paid, that default will not interfere with the duties of the Embankment Collector, unless the zemindari estate is thereby rendered insolvent, a contingency which is hardly immediate enough to come within the scope of section 56, clause (d) of the Specific Relief Act.

It appears to me that the civil Courts have no jurisdiction to modify or alter orders duly passed under section 68 of the Embankment Act and accordingly I think that the decision of the learned Subordinate Judge is right and dismiss the appeal with costs.

Against this decision, the plaintiffs preferred an appeal under section 15 of the Letters Patent.

Babus Baidya Nath Dutt and Bhupendra Nath Ghose for the Appellants.

Babu Nanda Lal Banerjee for the Respondents.

The judgments of the Court were as follows:

Jenkins C. J.—This is a suit whereby the plaintiffs seek to vindicate a right which they claim under a *putni* lease in their favour executed in 1870. By that document it was provided on the part of the zemindar as follows:—"We (that is, the zemindars) shall pay the Government revenue, *poolbundi* and *dak* cesses. You having nothing to do with the same." The Embankment Acts in force at that time were XXXII of 1835 (Government of India) and Act VII of 1866 (Government of Bengal), and for the purposes of this argument it has been assumed that the obligation in respect of embankment charges was on the zemindars at that time. Whether that was under Act VII of 1866 in all cases we need not now determine, but we will assume the correctness of the view that the stipulation which I have read gave practical effect to the state of the law as it then stood. These two Acts have been repealed and that now in force is Act II of 1882 of the Bengal Legislature. There are provisions in that Act under which there can be an apportionment of embankment charges as between the zemindar and his tenure-holders. There has been that which purports to be an apportionment under the Act and by it a certain burden in respect of *poolbundi* charges has been cast on the tenant. At the time of the proceedings before the revenue authority a protest was entered against this view on the strength of the stipulation in the *putni* lease of 1870. But the argument failed, and it was held that this made no difference

CIVIL.

1918,

Siba Prasad

v.
Gomatin Das.

Cose, J.

June, 19.

CIVIL
1913.
Srin Prosad
r.
Gosain Das.
Jenkins, C. J.

for the purposes of the Collector's decision, and arguments were advanced in the course of the decision to show how mischievous would be the result for which the plaintiff claimed. It may be that the Collector merely had to apportion without regard to the contractual rights between the parties; but of this I am confident that he had no power to take away from the plaintiff the benefit of any contractual right which he had against the zemindar, and that the plaintiff is entitled to come to this Court for the purpose of having his contractual rights vindicated.

The first question then that we have to determine is whether this suit can be entertained. At one time I felt some doubt as to whether the suit was not somewhat premature, and whether the proper method of meeting any claim advanced by the zemindar would not have been by defence to the suit. But any doubt on that score has been dissipated by a consideration of the provision contained in section 74 which vests in the zemindar wide powers of recovery of the amount to which he is entitled under an apportionment order. He could possibly realize his claim without going to a Court, and therefore I felt that it would be right for us to give protection to the plaintiff now, if he is entitled to it. More than that, it has been very properly conceded before us that in this case the plaintiff does intend to take action notwithstanding the terms of the agreement, so that the plaintiff is within the provisions of the law which require that it should be shown that there is reason to apprehend the breach of the contract on which he relies. Therefore, I think the suit is properly conceived. The only question there is whether the plaintiff has the contractual rights which he claims. The clause in the *putni* lease to which I have already referred is in wide terms; and is in effect an indemnity against *poolbundi* charges. The first point, therefore, we have to consider is whether that in respect of which the zemindar now intends to advance a claim is a *poolbundi* charge. Admittedly it is.

The next point for consideration is whether by reason of its being a *poolbundi* charge arising under an Act subsequent to the date of the *putni* it was outside the intention of the parties, so that, though covered by the words, it would not be fair to extend the agreement to this particular charge. There again, I think, there can be no doubt that the *poolbundi* charge with which we are concerned in this case is so similar to that which would have been in existence at the time of the *putni*

lease that it is clear it was within the intention of the parties to include such a *poolbundi* as that with which we are now concerned. Indeed, the basis of the contract between them must have been that the *putnidar* was to be exempt from all charges to which the term *poolbundi* could reasonably be applied. Therefore, I think, this second point, is established in the plaintiff's favour and that the agreement extends to the present *poolbundi* charges though they arise under the Act of 1882. This view is, I think, supported by the decision of the High Court in Appeal from Appellate Decree No. 920 of 1880, for it was there held that the agreement was operative, though prior to that suit Act VI of 1873 had come into operation and had superseded the previous Embankment Acts.

The final point is whether it is contrary to the policy of the law that we should enforce the agreement to which the parties came. I fail to see the fine distinction which embarrassed the learned Judge in reference to this point. The Government is in no way prejudiced by this contract between the zemindar and the *putnidar*. It is merely a contract that the zemindar will bear, as between him and the *putnidar*, certain charges. If the Government have any right against the property of the *putnidar*, this agreement would not prejudice in any way the assertion by the Government of its claim. I cannot bring myself to see the difficulty that there is in the zemindar undertaking to discharge a burden in the place of the *putnidar* or indemnifying the *putnidar* against this burden. Therefore, the final point, as appears to me, is also in the plaintiff's favour, that is to say, there is nothing in the Act of 1882 that would render this agreement contrary to the policy of the law or void for any other reason.

To sum up, in my opinion the decree of the lower appellate Court was erroneous, as was the judgment of Mr. Justice Cox by which it was affirmed. The Munsiff took a correct view.

We, therefore, restore the decree of the Munsiff with this variation that we only grant an injunction restraining the defendants from realizing *poolbundi* and *dak* charges from the plaintiffs in respect of the *putni*.

The plaintiffs must receive from the defendants their costs in all the Courts of appeal as well as in the Court of the Munsiff.

Mookerjee J.—I agree.

A. T. M.

Appeal allowed.

CIVIL.

1918.

Siba Prasad

Goswami Das.

Jenkins, O. J.

Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.

SHEIKH ABDUL RAHMAN

v.

JADUNANDAN SINGH JHA AND OTHERS.*

CIVIL,

1918.

June, 12.

Specific performance, suit for—Agreement to lease share of a member of joint family governed by Mitakshara law—Lease as to entirety, if can be enforced for part.

A member of a joint family governed by the Mitakshara law cannot say that he has any particular share in the joint family property and cannot make a valid alienation of any particular share as his own.

Sadabart Prasad Sahu v. Foolbask Koor (1) and *Balgobind Das v. Narain Lal* (2) referred to.

Hence a lease by a member of a joint family governed by the Mitakshara law of his share, is invalid in law and an agreement to lease such a share cannot be specifically enforced.

Where a person is jointly interested in an estate with another person and purports to deal with the entirety, specific performance will not be granted against him as to his share; the plaintiff's only remedy being by way of damages.

Lumley v. Ravenscroft (3) referred to.

Appeal by the Plaintiff.

Suit for specific performance of a contract to lease.

Defendants Nos. 1, 2, 3 and one Raghunandan who was not a party to the suit, were four brothers, governed by the Mitakshara School of Hindu Law, and were joint. Defendants Nos. 1, 2 and 3 made a contract with the plaintiff on the 19th Sraban 1315 to give a *putni* and *darputni* lease to the plaintiff in respect of the eight annas share held by themselves and Raghunandan in a certain mouza in zemindari and *putni* right and received five rupees in part payment of the *bonus*. The four brothers subsequently on the 15th Bhadro 1315 gave a joint lease to defendant No. 4. Afterwards on the 30th Bhadro 1315, the defendants Nos. 1, 2 and 3 made a modified agreement to lease their 6 annas share to the plaintiff on a proportionate reduction of *bonus* and *jama*. The lower appellate Court decreed the suit against defendants Nos. 1, 2 and 3 in respect of their share of 6 annas.

* Letters Patent Appeal No. 158 of 1911, under section 15 of the Letters Patent, against the decision of Mr. Justice D. Chatterjee, dated the 14th August, 1911 in Appeal from Appellate Decree No. 843 of 1910, against the decree of T. S. Hamilton, Esq., District Judge of Purnea, dated the 7th December 1909, reversing that of Babu Kamla Prasad, Munsiff, 2nd Court, of Kismanganj, dated the 29th June, 1909.

(1) (1869) 8 B. L. R. F. B. 31: 12 W. B. 11 F. B.

(2) (1898) L. B. 201 A. 116 (125); I. L. B. 15 All. 889.

(3) (1895) L. B. 1 Q. B. 684 (683).

The appeal first came to be heard by D. Chatterjee J. on the 7th August, 1911.

Babu Jogendra Nath Mookerjee for the Appellant.

Moulvi Nuruddin Ahmed for the Respondents.

The following judgment was delivered by

D. Chatterjee J.—This is a suit for the specific performance of a contract to lease. Defendants Nos. 1, 2, 3 and one Raghunandan who is not before the Court are four brothers. The lower appellate Court finds that defendants Nos. 1, 2, 3 made a contract with the plaintiff on the 19th Sraban 1315 to give a *putni* and *darputni* lease to the plaintiff in respect of the 8 anna share held by themselves and Raghunandan in a certain mauza in zamindari and *putni* right, and received Rs. 5 in part payment of the *bonus*, that as Raghunandan did not agree to join in the lease the four brothers gave a joint lease to defendant No. 4 on the 15th Bhadro 1315 under a lease which was registered and thereafter on the 30th Bhadro 1315 the defendants Nos. 1, 2, and 3 made a modified agreement to lease their 6 annas share to the plaintiff on a proportionate reduction of *bonus* and *jama* and that defendant No. 4 must have taken his lease with notice of the contract with the plaintiff. Upon these findings the lower appellate Court has given a decree for specific performance against defendants Nos. 1, 2 and 3 in respect of their share of 6 annas. It is contended in second appeal before me that the learned Judge is wrong because the defendants Nos. 1, 2 and 3 and Raghunandan being members of a joint family governed by the Mitakshara law the defendants Nos. 1, 2 and 3 had no definite share before partition and cannot be compelled to make an alienation which would be invalid in law. It is settled law in Bengal that a member of a joint family governed by the Mitakshara law cannot say that he has any particular share in the joint family property and cannot make a valid alienation of any particular share as his own. See *Sadabart Prasad Sahu v. Foolbask Roer* (1), and *Balgobind Das v. Narain Lal* (2). The question was expressly raised by the defendants in their written statement and issue No. 3 was framed in this connection. The learned Judge also says that Raghunandan is joint. If that be so I do not see how defendants can be compelled to execute a *putni* and *darputni* lease in respect of a 6 annas share in the 8 annas joint property. Such a lease would be invalid in law and the Courts will not order that to be done which when done would be invalid. Then again the con-

CIVIL

1918.

Sheikh Abdul
c.
Jadunandan.

1911.

August, 14.

(1) (1889) 8 B. L. R. F. B. 81.

(2) (1898) L. B. 20 I. A. 116 (125).

CIVIL.

1918.

Sheikh Abdul

Jadunandan.

D. Chatterjee, J.

tract of the 19th Sraban for leasing 8 annas could not be enforced as defendants Nos. 1, 2 and 3 could not contract with respect to the share of Raghunandan and the contract which was made for the whole 8 annas could not be specifically performed with respect to the share of defendants Nos. 1, 2 and 3 under the general rule that where a person is jointly interested in an estate with another person and purports to deal with the entirety specific performance will not be granted against him as to his share; the plaintiff's only remedy being by way of damages. See *Lumley v. Ravenscroft* (1). If the contract of Sraban cannot be enforced, the contract of the 30th Bhadro must be considered a new contract and cannot be enforced against defendant No. 4 who had a prior valid title on the 1st Bhadro. In any case I think the decree for specific performance is bad. The conduct of defendants Nos. 1, 2 and 3 is extremely reprehensible and they ought to be made liable in damages. The lower appellate Court has found that they received Rs. 5 as part of the *bonus*; they must refund that with interest at 12 per cent. per annum from the 30th Bhadro 1315 and they must pay the whole costs of the plaintiff in all Courts. Defendant No. 4 will pay his own costs. The appeal is decreed with the above modification.

Against this decision, the plaintiff preferred an appeal under section 15 of the Letters Patent.

Moulvi Nuruddin Ahmed for the Appellant.

Babu Jogendra Nath Mookerjee for the Respondents.

The judgment of the Court was delivered by

Jenkins C. J.—In our opinion Mr. Justice Digambar Chatterjee exercised a wise discretion with which we are not disposed to interfere on appeal. We must therefore dismiss this appeal with costs.

A. T. M.

Appeal dismissed.

June, 19.

(1) (1895) L. R. 1 Q. B. 624 (683).

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice and
Sir Asutosh Mookerjee, Knight, Judge.*

MAHARAJADHIRAJ SIR BEJOY CHAND MAHATAP
BAHADUR

v.

CHANDI CHARAN CHATTERJEE AND OTHERS.*

CIVIL.

1912.

June, 10, 11.

*Ejectment, suit for—Image, consecration of—Endowment of land—Image destroyed
by action of river—Consecration of another image in the same village—
Trustees, if to apply the proceeds—Service tenure—Hindu Law—Debutter.*

When an image has been mutilated or destroyed, the religious purpose does not come to an end and an endowment is not affected by the destruction or mutilation of the image. The religious purpose still survives, and a new image may be established and consecrated in order that it may be worshipped as intended by the original founder.

Purna v. Gopal Lal (1) referred to.

When land was given to the defendant for definite purposes, namely, that he might apply the income thereof for the purposes of the service of the image established by the plaintiff's predecessor and the image having ceased to exist, a new image was installed and consecrated by the successor of the enower in the same village and the defendant declined to apply the proceeds of the property in the worship of the new image:

Held, that the service tenure came to an end and the defendant was not entitled to retain possession of the land.

Appeal by the Plaintiff.

Suit for ejectment.

The material facts were stated in the judgment of Coxe J.

The appeal first came to be heard by Mr. Justice Coxe on the 18th January, 1912.

Babus Basant Coomar Bosu and Soroshi Churn Mitra for the Appellant.

Babus Ram Chandra Mozumdar and Karunamoy Bosu for the Respondents.

The following judgment was delivered by

Coxe J.—This is a suit of an unusual nature. It is said that long ago the plaintiff's predecessor consecrated an idol by the name of Trilokeswar and made over the lands in suit to one Nrisingha Ram in order that the cost of the service of the idol might be defrayed from the profits. Nrisingha Ram afterwards made over the lands to the defendant with the charge to carry

1912.

January, 30.

* Letters Patent Appeal No. 21 of 1912, under section 15 of the Letters Patent, against the decision of Mr. Justice Coxe, dated the 30th January, 1912, in Appeal from Appellate Decree No 1287 of 1900, against the decree of Babu Debendra Bejoy Bose, Additional Subordinate Judge of Burdwan, dated the 19th April, 1909, affirming that of Babu Akshay Kumar Bose, Munsiff, 2nd Court, of Katwa, dated the 28th February, 1908.

(1) (1908) 8 O. L. J. 869 (890).

CIVIL.

1918.

Rejoy Ohand
 v.
 Chandl Oharan
 Case, J.

on the worship and pay for the cost out of the proceeds of the property.

The river then swept away the temple. There is some conflict of evidence as to what happened to the idol, but it is clear that it is not forthcoming now. The plaintiff has now consecrated another idol under the same name and erected another temple for it. He now wants that the proceeds of the land shall be devoted to the service of this new idol. The Courts below have dismissed the suit and the plaintiff appeals.

The Munsiff held that the allegations in the plaint were wholly unproved, that it was not proved that this land was ever dedicated to the idol Trilokeswar, or given to the predecessor of the defendant in order that he might pay the cost of worship. All that was shown, in the Munsiff's opinion was that the defendant held this land *debutter* and that the deed assigning it to him indicated that he held it for his maintenance and for worshipping his family idols including Trilokeswar. The learned Subordinate Judge in appeal does not come to any definite finding that the plaintiff has failed to prove that these lands were subject to a charge for the worship of Trilokeswar. He apparently accepts the deed of assignment as showing that the original holder of the land got the property in suit as *debutter* to enable him out of the proceeds thereof to carry on the worship of the idol Trilokeswar Shiva and family idols.

It seems to me that even if the lands were given in trust for the worship of the idol, the plaintiff could not succeed unless he showed that this second idol could fairly be regarded as a continuation of the first. Clearly the plaintiff could not, by the simple expedient of calling the idol by the same name, erect a temple in Calcutta half a century later and call on the defendant to devote the proceeds of the land to its service. On the other hand if the new temple had been erected immediately after the destruction of the old one and as close to the original situation as was possible, there could be little doubt that if the land was originally liable to the charge of the service of the old idol it would continue liable to the charge of the service of the new one.

Now in the present case the Subordinate Judge finds that the old temple was swept away forty years ago and that "this is practically speaking a new Shiva with an old name." Even supposing therefore that the land was given in trust originally, the plaintiff cannot in my opinion call on the defendant to defray the cost of service of the new idol,

As for the prayer for resumption of the land the plaintiff must establish affirmatively that the land was originally given in trust. The Munsiff found this definitely against him. The learned Subordinate Judge is not so definite but the passage I have quoted above indicates to my mind that he did not intend to displace the Munsiff's finding and thought the evidence insufficient.

Accordingly the appeal is dismissed with costs.

Against this decision, the plaintiff preferred an appeal under section 15 of the Letters Patent.

Babus Basant Coomar Bose and *Soroshi Churn Mitra* for the Appellants.

Babu Kârunamoy Bose (with him *Babu Ram Chandra Moxumdar*) for the Respondents.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the plaintiff in a suit which has been described by the Courts below as a suit of a novel description. The defendant is in possession of a land which originally belonged to the predecessor of the plaintiff, the Maharaja of Burdwan. More than half a century ago the then Maharaja established an image of *shiva* and named it *Trilokeswar shiva* after himself. The allegation of the plaintiff is that the land in dispute was made over to the predecessor of the defendant in order that the income might be applied for the worship of the image so established. The Maharaja asserts that about forty years before the commencement of this litigation, the site on which the temple of *shiva* stood was washed away by the river Bhagirathi, that the image itself was broken to pieces, that since that time the broken image has been worshipped by the predecessor of the defendant, that the Maharaja has recently established a new image of *shiva* in a newly constructed temple in the same village, and that the defendant has refused to perform the worship of this image. The plaintiff therefore asks for relief in the alternative in this manner. He prays in the first place that the defendant may be compelled to perform the worship of the newly established image; in the second place, that the defendant may be called upon to provide out of the income of the land in his possession the articles necessary for the worship of the image, and finally that if the defendant refused to perform the worship or to supply the articles necessary in that behalf, a decree may be made against him for ejectment.

CIVIL

1918.

Pejoy Ohand

v.
Chandi Oharan.

Coomar, J.

JAN, 11.

CIVIL.

1913.

Bejoy Chand

v.

Chandi Charan.

Mookerjee, J.

The defendant repudiated his liability to perform the worship. His case was that the land had been granted to his predecessor for the worship of his family idols and that neither he nor his predecessor was ever under any obligation to perform the worship of the image *Trilokeswar shiva*. The suit has been dismissed by all the Courts below.

On the present appeal it has been contended that, upon the facts found, there is no answer to the claim. The defendant has produced an *arpannamah* executed in his favour by his predecessor in 1882. In so far as this deed of transfer contains an admission by his predecessor it may be used against him. The *arpannamah* recites that the land had been granted by the Maharaja of Burdwan to the predecessor of the defendant in order that the income thereof might be applied for the worship of his family idols and also of *Trilokeswar shiva*. It has been argued on behalf of the defendant respondent in this Court that this at best indicates that the dedication, if any, was for the benefit of the family idols of the defendant, as also of the image established by the Maharaja. It is answered that the defendant cannot use in his favour an admission by his predecessor in his own interest. Under the circumstances it is clear that the property must have been made over by the Maharaja to the predecessor of the defendant in order that the income might be applied for the worship of the image *Trilokeswar shiva*. The question consequently arises whether this trust came to an end when the temple was washed away and the image was broken. On behalf of the respondent it has been contended on the authority of a text of Hayasirsha quoted and translated in Shastri Golap Chandra Sarkar's Hindu Law, Fourth Edition, page 471 that when an image has been mutilated or destroyed, it may be renewed of the same material of the same size and in the same place, and that this renewal must be made on the second or on the third day. In our opinion this text does not assist the contention of the respondent. This text shows that when an image has been mutilated or destroyed, the religious purpose does not come to an end, and as pointed out by this Court in the case of *Purna Chandra Bysack v. Gopal Lal Sett* (1) the endowment is not affected by the destruction or mutilation of the image. The religious purpose still survives, and a new image may be established and consecrated in order that it may be worshipped as intended by the original

founder. Were the contention of the respondent to prevail, the endowment would come to an end, if, as has happened in this case, the land upon which the temple stood was washed away by the action of the river. This view is not supported by any text or any principle of the Hindu Law which has been brought to our notice. It is on the other hand clearly opposed to the principle recognized by a Full Bench of this Court in the case of *Bhupati Nath Smrititirtha v. Ram Lal Maitra* (1). If then the endowment was not destroyed when the land upon which the temple stood was washed away and the image was broken, what has happened since then to alter the position of the parties? The defendant is in the same position as if he held a service tenure: The land was given to him for a definite purpose, namely that he might apply the income thereof for the purposes of the service of the image established by the Maharaja. That image has ceased to exist and a new image has been installed and consecrated by the successor of the Maharaja and it has been named after the original founder, *Trilokeswar shiva*. It is in the same village. There is no conceivable reason why the defendant should decline to apply the proceeds of the property in the worship of the idol. This he has deliberately refused to do. The Court cannot compel him to perform the worship, when he repudiates his obligation in that behalf. The only course which the Court can adopt under such circumstances is to hold that the service tenure has come to an end, and the defendant is not entitled to retain possession of the land. This is clear from the decision of this Court in *Hurrogobind Raha v. Ramrutno Dey* (2) and in *Ansar Ali Femadar v. C. E. Grey* (3).

The result, therefore, is that this appeal must be allowed and the decrees of the Courts below discharged; the suit will stand decreed, and the defendant must deliver possession of the property to the plaintiff. The plaintiff will be entitled to his costs in all the Courts.

The claim for mesne profits is abandoned.

A. T. M.

Appeal allowed; suit decreed.

(1) (1909) I. L. B. 37 Calo. 128; 10 O. L. J. 355.

(2) (1878, I L. B. 4 Calo. 67.

(3) (1906) 2 O. L. J. 403.

CIVIL.

1918.

Bejoy Ghand

Chand Charan.

Mookerjee, J.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

DHIRAJ BALA DAS

v.

GOPAL CHANDRA MUKHOPADHYA.*

CIVIL

1918.

May, 8.

Libel—Malicious prosecution—Proceedings under Bengal Disorderly Houses Act (III B. O. of 1908)—Limitation Act (IX of 1908), Sec. I, Arts 23, 24.

When proceedings are taken against a person under the Bengal Disorderly Houses Act, he cannot be said to be maliciously prosecuted.

An allegation by the defendant in his report to the Magistrate in proceedings under the Bengal Disorderly Houses Act comes under Article 24 of the Schedule I of the Indian Limitation Act and a suit should be instituted within one year from the date of the libel.

Appeal by the Plaintiff.

Suit for damages.

In 1907, the defendants took proceedings under the Bengal Disorderly Houses Act on the allegation that the plaintiff was a woman of no character and used her house for purposes of habitual prostitution. The Magistrate after enquiry made an order on the 2nd October 1907, upon her to discontinue such use of her house within a specified period. In 1908 the plaintiff brought a suit against the defendant and the Secretary of State for India in Council for declaration that she was a woman of good character and that the order of the Magistrate had been erroneously made. That suit was decreed in her favour by the Court of first instance on the 17th February, 1909. An appeal against that decree was withdrawn on the 20th April, 1909. The plaintiff commenced the present action on the 16th April 1910 for damages in respect of what was described as a maliciously false suit, but in the plaint she claimed damages on account of defamation and bodily and mental pain. The Courts below dismissed the suit as barred under Article 23 of the first Schedule of the Indian Limitation Act.

Babus Sib Chandra Palit, Biraj Mohan Mojumdar and Khirode Narain Bhuiyan for the Appellant.

Babu Jyotis Chandra Hama for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the plaintiff in a suit for damages. Her case is that although she is a respectable woman,

May, 8.

*Appeal from Appellate Decree No 1530 of 1911, against the decree of Babu Surendra Nath Mitra, Subordinate Judge of Midnapur, dated the 29th March 1911, affirming that of Babu Gopal Chandra Bose, Munsiff of Tamluk, dated the 21st June, 1910.

the defendants took proceedings against her in 1907 under the Bengal Disorderly Houses Act of 1906 on the allegation that she was a woman of no character and used her house for purposes of habitual prostitution. The Magistrate enquired into the matter and made an order upon her to discontinue such use of her house within a specified period. This order was made on the 2nd October 1907. In 1908 the plaintiff brought a suit against the defendants as also against the Secretary of State for India in Council for declaration that she was a woman of good character and that the order of the Magistrate had been erroneously made. That suit was decreed in her favour by the Court of first instance on the 17th February 1909. An appeal was preferred against that decision but was withdrawn on the 20th April 1909. The plaintiff commenced the present action on the 16th April 1910 for damages in respect of what is described as a malicious false suit; but in the plaint she claims damages on account of defamation and bodily and mental pain. The Courts below have concurrently dismissed the claim on the ground that the suit was in its essence one for damages for malicious prosecution and was barred under Article 23 of the first schedule to the Indian Limitation Act, 1908. On behalf of the appellant, it has been argued that Article 23 has no application, because it cannot be contended with any show of reason that the suit is for damages for malicious prosecution. We are of opinion that this contention is well-founded. When proceedings are taken against a person under the Bengal Disorderly Houses Act, 1906, he is not prosecuted. The order passed upon such a person is to the effect that he should discontinue the use of the house for purposes of habitual prostitution. It is only when he fails to comply with such order within the period stated that the Magistrate imposes upon him a fine. We are of opinion that when proceedings are taken against any person under this statute, it cannot be said that he has been maliciously prosecuted. At the same time, we are of opinion that the present suit must be dismissed on the ground that it is barred under Art. 24 of the first schedule to the Limitation Act. Article 24 provides that a suit for compensation for libel must be instituted within one year from the date when the libel is published. If the case of the plaintiff is well-founded on facts, the allegation made by the defendants in their report to the Magistrate that she was a woman of no character and used her house as a brothel, was a libel. Consequently the suit should

CIVIL.

1918.

Dhiraj Bala Dasl.

v.

Gopal Chandra.

Mookerjee, J.

CIVIL.

1918.

Dhiraj Rala Das

v.

Gopal Chandra.

Mookerjee, J.

have been instituted within one year from the date of the libel. In this view, we are supported by the decision in *Isht v. Muhammad Hadi* (1).

The result is that the decree of the Subordinate Judge is affirmed, though not for the reason assigned by him, and this appeal is dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1902) I. L. B. 24 All. 263.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

ACHHUTANAND BHATTACHARJI

v.

RAM NATH BHATTACHARJI.*

CIVIL.

1918.

May, 1.

Mortgage suit—Equity of redemption, purchaser of—Instrument, alteration of—Insertion of clause for compound interest—Material alteration—Burden of proof—Appellate Court, power of, at the final decision of appeal.

When a mortgagee seeks to hold the property in the hands of the purchaser of the equity of redemption liable for the mortgage debt, the latter is entitled to establish to the satisfaction of the Court that the conduct of the plaintiff has been such that no Court of equity will assist him. Hence the purchaser of the equity of redemption is at liberty to raise the question of the legality of the mortgage instrument.

Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument, either in its terms or the relation of the parties to it, is a material change, or, technically, an alteration, and such a change will invalidate the instrument against all persons not consenting to the change.

Hence an addition of a clause for payment of compound interest without the knowledge and consent of the mortgagor is a material alteration of the instrument.

Sutton v. Toomer (1), *Warrington v. Eirly* (2) and *Draper v. Wood* (3) referred to.

Gour Chandra v. Prasanna Kumar (4) followed.

The principle on which the above rule is based is that no man shall be permitted, on grounds of public policy to take the chance of committing a fraud without running any risk of loss by the event when it is detected; and that by the alteration the identity of the instrument is destroyed and to hold one of the parties liable under such circumstances would be to make for him a

* Appeal from Appellate Decree No. 1275 of 1910, against the decree of Babu Bankim Chandra Mitra, Subordinate Judge of Burdwan, dated the 18th December, 1909, reversing that of Bibu Ambica Chandra Majumdar, Munsiff of Burdwan, dated the 16th December, 1908.

(1) (1827) 7 B. & C. 416. (2) (1858) 2 H. & B. 768.

(3) (1878) 113 *Mas.* 815.

(4) (1906) 3 C. L. J. 858; I. L. B. 88 Cal. 812.

contract to which he never agreed. The rule is not based upon any technical or peculiar features of English jurisprudence.

The burden lies upon the purchaser of the equity of redemption to establish that a clause for payment of compound interest was an alteration made subsequent to the execution of the instrument and without the knowledge and consent of the executant.

It is open to the appellate Court at the time of the final decision of the appeal to consider the whole appeal and decide according to the correct view of the matter.

Appeal by Defendant No. 2.

Suit to enforce mortgage security executed by defendant No. 1.

Defendant No. 2 was the purchaser of the equity of redemption. The Court of first instance held that the mortgage bond had not been attested as required by law and passed a personal decree against defendant No. 1. As regards interest, the Court found that after the execution of the bond and before its registration, the mortgagee interpolated a clause for payment of compound interest, and passed a decree for simple interest against defendant No. 1. On appeal it was held that the mortgage bond had been duly attested but the question whether or not the clause for payment of compound interest had been interpolated after execution of the bond without the knowledge and consent of the executant, was not considered. On appeal to the High Court, the case was remanded for the decision as to interpolation and the Subordinate Judge returned his finding that the question must be answered in the affirmative. The whole appeal was then heard by the High Court.

Babu Manmatha Nath Mukherjee for the Appellant.

Babu Brojendra Nath Chatterjee for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the second defendant in a suit to enforce a mortgage-security executed in favour of the plaintiff by the first defendant on the 26th May, 1904. The loan was repayable on the 13th April, 1907. The present suit was commenced on the 24th April, 1908. The claim was resisted by the second defendant who is a subsequent purchaser of the equity of redemption. The Court of first instance held that the instrument had not been attested as required by law and was consequently not operative as a mortgage-bond. In this view, a personal decree was made against the first defendant, and the suit was dismissed as against the second defendant. As regards interest, the Court found that the first defendant

CIVIL.

1912.

Achhutanand

v.

Ram Nath.

May, 1.

CIVIL.

1918.

Aobhutanand

v.

Ram Nath.

Mookerjee, J.

had agreed to pay simple interest at the rate of two per cent. per month, but that after the execution of the mortgage-bond and before its registration, the mortgagee interpolated a clause to the effect that upon interest in arrears interest would be payable at the same rate as upon the principal sum. The Court consequently made a decree for simple interest as against the first defendant. The plaintiff appealed to the Subordinate Judge. On the appeal, it was held that the mortgage bond had been duly attested. Consequently the decree of the Court of first instance was discharged and the usual mortgage decree made. The Subordinate Judge did not however, consider the question, whether or not the clause for payment of compound interest had been interpolated after execution of the bond without the knowledge or consent of the executant. The second defendant has appealed to this Court against the mortgage decree. The appeal was heard in the first instance by Mr. Justice Richardson; he sent down an issue to the Subordinate Judge to the following effect—was the bond altered after its execution without the knowledge and consent of the first defendant by the addition of the stipulation for the payment of compound interest? The Subordinate Judge has returned his finding that the question must be answered in the affirmative. The position, therefore, is that after the mortgage bond had been executed by the first defendant, the mortgagee interpolated therein a clause for the payment of compound interest without the knowledge and consent of the mortgagor. It has now been argued on behalf of the second defendant, upon the authority of the decision of this Court in the case of *Gour Chandra Das v. Prasanna Kumar Chandra* (1) that the instrument is inoperative as a mortgage bond and that consequently the suit must be dismissed as against him. On behalf of the plaintiff respondent, it has been argued, *first*, that the Subordinate Judge has erroneously thrown upon him the burden of establishing that the clause for the payment of compound interest was not an interpolation; *secondly*, that the judgment of Mr. Justice Richardson is conclusive upon the question of the legal effect of the bond as altered; *thirdly* that the second defendant who purchased the property subject to the mortgage is not at liberty to raise the question of the legality of the mortgage instrument; *fourthly*, that the insertion of a clause for payment of compound interest after the execution

(1) (1906) 8 O. L. J. 868; 10 O. W. N. 788.

of the bond, without the knowledge and consent of the mortgagor, is not a material alteration invalidating the instrument; and *fifthly* that the rule on this subject, as recognised in English Jurisprudence should not be applied to this country. In our opinion, each of these contentions is entirely untenable.

As regards the first ground, it need not be disputed that the burden lies upon the defendant to establish that the clause in question was an alteration made subsequent to the execution of the instrument and without the knowledge and consent of the executant. This burden, however, has been discharged and the Subordinate Judge has found upon the evidence that the bond was altered as specifically alleged by the second defendant in his written statement.

As regards the second ground, it is plain that Mr. Justice Richardson did not decide that if it was ultimately found that the clause for payment of compound interest was an interpolation the plaintiff would still be entitled to enforce the mortgage-bond and claim thereunder simple interest at the rate of two per cent. per month. But, even if there had been such an expression of opinion, it would have been open to this Court at the time of the final decision of the appeal to consider the whole appeal and decide according to the correct view of the matter: *Hiattunnessa v. Railash Chandra* (1), *Ganendra Nath v. Surya Kant* (2), *Lachman v. Jamna* (3), *Mubarak v. Bihari* (4) and *Hanuman Das v. Gursakay Singh* (5).

As regards the third ground, it has been urged that the conveyance under which the second defendant claimed title, shows on the face of it that he assumed payment of the mortgage debt. On this basis, it has been contended that he at any rate cannot raise the question of the legality of the mortgage instrument. There is in our opinion no substance in this argument. It may be assumed for our present purpose that the second defendant did as a matter of fact pay to the first defendant a smaller amount of consideration than he would have done if the property had not been encumbered. But that is a matter entirely between the vendor and the purchaser. When the plaintiff seeks to hold the property in the hands of the second defendant liable for the mortgage debt, the latter is entitled to establish to the satisfaction of the Court that the conduct of the plaintiff has been such that no Court of equity will assist him. Consequently, this defence is available to the second defendant.

CIVIL.

1918.

Aobhutanand

Ram. Nath.

Mookerjee, J.

(1) (1905) 18 O. L. J. 259.

(2) (1912) 17 O. W. N. 462

(4) (1894) L. L. R. 18 All. 208

(5) (1887) L. L. R. 10 All. 102.

(5) (1909) 18 O. L. J. 181.

CIVIL.

1918.

Achhutanand

v.

Ram Nath,

Mookerjee, J.

As regards the fourth ground, it has been urged that the addition of a clause for payment of compound interest without the knowledge and consent of the mortgagor is not a material alteration of the instrument. This contention is clearly unsound. As was pointed out by this Court in the case of *Gour Chandra Das v. Prasanna Kumar Chandra* (1) any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument, either in its terms or the relation of the parties to it, is a material change, or technically, an alteration, and such a change will invalidate the instrument against all persons not consenting to the change. A covenant for the payment of interest is obviously a very material part of the mortgage-bond; and it is well-settled that the alteration of the rate of interest or the addition of a clause for the payment of interest is a material alteration of the instrument: *Sutton v. Toomer* (2), *Leonard Warrington v. John Early* (3) and *Draper v. Wood* (4).

As regards the fifth ground, it has been contended that the rule on this subject as recognised in English Jurisprudence should not be adopted by this Court. The principle on which the rule in question is based was explained by this Court in the case of *Gour Chandra Das v. Prasanna Kumar Chandra* (1) namely, that no man shall be permitted, on grounds of public policy, to take the chance of committing a fraud without running any risk of loss by the event when it is detected; and that by the alteration the identity of the instrument is destroyed and to hold one of the parties liable under such circumstances would be to make for him a contract to which he never agreed. The rule itself obviously is not based upon any technical or peculiar features of English Jurisprudence and there is no conceivable reason why it should not be applied to this country.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. The suit will stand dismissed with costs as against the second defendant, but there will be a personal decree against the first defendant, as directed by the Court of first instance. In view of the conduct of the plaintiff respondent as also in view of the fact that the case has been twice argued before this Court, we assess the hearing fee in this Court at eight gold mohurs.

A. T. M.

Appeal allowed.

(1) (1906) 3 O. L. J. 863; 10 O. W. N. 768 (3) (1858) 2 E. and B. 763.
 (2) (827) 7 B. and C. 416. (4) (1873) 113 Mass. 815.

CIVIL RULE.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

HANSESWAR GHOSE

v.

RAKHAL DAS GHOSE.*

Civil

1918.

May, 23.

Insolvency proceeding—Receiver, appointment of—Receiver acting in excess of his authority—Third person, remedy of—Provincial Insolvency Act (III of 1907), Sec. 22—Person aggrieved.

When a Receiver has been appointed under the Provincial Insolvency Act, he becomes an officer of the Court, and if he is about to act in excess of his authority, it is competent to a stranger to bring that fact to the notice of the Court, which has inherent power to review the conduct of the Receiver and to make an appropriate order so that the stranger may not be prejudiced by an unlawful act of its own officer; and for this purpose, the Court may hold a summary enquiry.

‘A person aggrieved’ in section 22 of the Provincial Insolvency Act means a person who has suffered a legal grievance; a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something, and does not mean a person who has lost a benefit which he might have obtained, if an order has been made.

Ex parte Stidobham (1) followed.

During the pendency of proceedings under the Provincial Insolvency Act, the mortgagee in execution of his mortgage decree purchased the properties under mortgage. The mortgagor was subsequently adjudged an insolvent and a Receiver was appointed with a direction to act in accordance with law. On the 28th July, 1911, the Receiver sent to the Court a sale proclamation in which he included the properties purchased by the mortgagee. The sale proclamation was served on the 1st August, 1911. On the 28th August, 1911, the mortgagee purchaser appeared in Court and presented a petition of objection in which he stated that the Receiver had no authority to sell the properties purchased by him:

Held, that section 22 of the Provincial Insolvency Act had no application to such a case.

Applications for revision by the Mortgagee auction-purchaser.

The material facts are stated above.

Babu Bepin Chandra Mullick for the Petitioner.

No one for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee J.—We are invited in this Rule to set aside an

May, 23.

* Civil Rules Nos 24 and 25 of 1918, with Appeals from Orders Nos. 567 and 568 of 1912, against the orders of M. Yusuf, Esq., District Judge of Burdwan, dated the 28th August, 1912.

CIVIL

1918.

Hanseswar

v.
Rakhal Das.

Mookerjee, J.

order by which the Court below has refused an application ostensibly made under section 22 of the Provincial Insolvency Act of 1907. The petitioner alleges that he obtained a mortgage decree against one Rakhal Das Ghose on the 20th March, 1908. That decree was made absolute on the 7th December 1909. Before the decree could be executed the mortgagor made an application in insolvency on the 31st May 1910. During the pendency of the proceedings under the Insolvency Act, the decree was executed and the mortgagee purchased the properties at the execution sale on the 24th November 1910. The mortgagor was subsequently adjudged an insolvent on the 31st May 1911, and a Receiver was appointed on that date with direction to act in accordance with law. On the 25th July 1911, the Receiver sent to the Court a sale proclamation in which he included the properties purchased by the petitioner. The sale proclamation was served on the 1st August 1911. On the 28th August 1911, the mortgagee purchaser appeared in Court and presented a petition of objection in which he stated that the Receiver had no authority to sell the properties purchased by him. His application was based on the allegation that the properties in question had ceased to be part of the estate of the insolvent long before the receiver had been appointed; and that, the Receiver was not competent to sell properties which did not in reality belong to the insolvent. The Court summarily overruled the objection on the ground that it had been made after the expiry of 21 days from the date of the order of the Receiver. The propriety of this order is assailed before us, and the question in controversy is, whether section 22 has any application to the matter.

Section 22 provides that if the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the Court, and the Court may affirm, reverse or modify the act or decision complained of and make such order as it thinks fit. The petitioner is not the insolvent, nor is he one of the creditors, because his case is that he ceased to be a creditor when the execution sale took place. Is he, then, a person aggrieved by any act of the Receiver? The act of the Receiver which he challenges is the issue of the sale proclamation; and the question arises, whether he can be said to be aggrieved by that act of the Receiver. Now, it was pointed out by Mr. Justice James in *Ex parte Sidebotham* (1) that 'a person aggrieved' means a person who has suffered a legal grievance; a man against whom a decision has been

(1) (1879) 14 Ch. D. 458.

pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something ; and does not mean a person who has lost a benefit which he might have obtained, if an order had been made. If the allegations of the petitioner are well-founded on fact, the intended sale by the Receiver cannot affect his title, because the properties in question are no longer the properties of the insolvent. Consequently, he cannot be deemed to be a person aggrieved by the act of the Receiver. Section 22 of the Provincial Insolvency Act has consequently no application to the case before us.

But it does not follow that the Court is not competent to deal with the objection taken by the petitioner. When a Receiver has been appointed, he becomes an officer of the Court, and if he is about to act in excess of his authority, it is competent even to a stranger to bring that fact to the notice of the Court, which has inherent power to review the conduct of the Receiver and to make an appropriate order so that the stranger may not be prejudiced by an unlawful act of its own officer ; and for this purpose, the Court may hold a summary enquiry. This view is in accord with that taken in the cases of *Ex parte Cochrane* (1), *Searle v. Choate* (2) and *In re Rasul Haji Cassum* (3). The inference follows that the application made by the petitioner to the Court below must be entertained and an enquiry held into the truth or otherwise of his allegation ; but the application is not one under section 22 of the Provincial Insolvency Act and is consequently not subject to the period of limitation prescribed by the proviso to that section.

The result is that this Rule is made absolute, the order of the Court below set aside and the case sent back to that Court for enquiry, whether or not the allegations of the petitioner are well-founded. If it is found as a fact that the petitioner has acquired a valid title to the properties by his purchase at the mortgage sale on the 24th March 1910, the Receiver plainly cannot proceed to sell them as the properties of the insolvent. As the application has not been opposed, we make no order as to costs.

It is conceded that this order will govern the other Rule (25 of 1913).

The appeals (M.A. Nos. 567 and 568 of 1912) are dismissed under Order 41, Rule 11 of the Code of Civil Procedure.

A. T. M. *Rules made absolute. Cases sent back : Appeal dismissed under O. 41, R. 11, C. P. C.*

(1) (1875) L. B. 30 Eq. Cas. 282.

(2) (1894) 23 Ch. D. 723.

(3) (1910) 13 Bom. L. R. 13.

CIVIL

1913.

Hanswar

Rakhal Das.

Mookerjee, J.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

CIVIL.

1913.

May, 23.

ASHI BHUSAN DAS

v.

PELARAM MANDAL.*

Decree, execution of—Decree against alleged adopted minor son—Adoption proved invalid—Guardian-ad-litem real representative—Guardian-ad-litem, if can be proceeded against.

In a decree obtained in a claim for mesne profits against an alleged adopted minor son as the representative of the wrong-doer, who was found in another suit to be not validly adopted, the decree-holder could not proceed against the judgment-debtor, as he had not received any assets of the wrong-doer; nor could he ask the Court to substitute the name of the real representative, who was appointed *guardian-ad-litem*, in the decree; nor could he proceed against the *guardian-ad-litem*. The remedy of the decree-holder was by way of a suit against the legal representative.

Mohunt Das v. Nil Kowal Dewan (1) and *Joy Chandra v. Srinath* (2) referred to.

Rule obtained by the alleged Judgment-debtor.

Application for execution of decree. —

On the 8th February, 1909, the opposite party obtained a decree for mesne profits against Surendra Nath Roy, whom he described as the infant adopted son of Panchanon Roy. His claim was against Panchanon Roy; but before he could commence his suit, Panchanon died. He accordingly sued the alleged infant adopted son represented by Ashi Bhusan Dasi (the petitioner in this Rule) as mother and *guardian-ad-litem*, and obtained a decree. Before execution was taken on the basis of this decree, in another suit tried by a Court of competent jurisdiction, it was declared that the infant had not been validly adopted. The decree-holder after fruitlessly applying for execution, made an application that Ashi Bhusan Dasi might be substituted in place of Surendra Nath Roy in the decree and that execution might proceed against her. The order was made *ex parte* and in proceedings in execution the properties in the hands of Ashi Bhusan were sold and purchased by the decree-holder himself.

Babu Hirendra Nath Ganguli for the Petitioner.

Babu Abinas Chandra Chakravarti for the Opposite Party.

* Civil Rule No. 440 of 1913, against an order of Babu Bopin Behary whose, Munsiff of Midnapur, dated the 25th February, 1913

(1) (1899) 4 O. W. N. 283.

(2) (1904) 1 O. L. J. 23; I. L. R. 32 Calc. 857.

The judgment of the Court was delivered by

Mookerjee J.—We are invited in this rule to set aside proceedings in execution of a decree for money, which have been taken under circumstances of a somewhat exceptional character. On the 8th February 1909, Pelaram Mandal, the opposite party in this Rule, obtained a decree for mesne profits against Surendra Nath Roy whom he described as the infant adopted son of Panchanon Roy. His claim was against Panchanon Roy; but before he could commence his suit, Panchanon died. He accordingly sued the alleged infant adopted son represented by Ashi Bhusan Dasi as mother and *guardian-ad-litem*, and obtained a decree. Before execution could be taken on the basis of this decree, in another suit tried by a Court of competent jurisdiction it was declared that the infant had not been validly adopted. The decree-holder, however, proceeded to attach properties which formed part of the estate of Panchanon Roy. Objection was thereupon taken by Ashi Bhusan Dasi, who claimed to be in possession as the widow of Panchanon Roy. The objection was allowed, and there is no room for controversy that it was allowed very properly. The decree-holder then proceeded to make an application that Ashi Bhusan Dasi might be substituted in place of Surendra Nath Roy, in the decree and that execution might proceed against her. The order was made *ex-parte*, and in proceedings in execution, the properties in the hands of Ashi Bhusan Dasi have been sold and purchased by the decree-holder himself. In our opinion, these proceedings are entirely without jurisdiction and must be set aside. The decree was obtained against Surendra Nath Roy as the representative of Panchanon Roy, and could be executed against him to the extent of the assets in his hands. Admittedly there are no assets in his hands because he is not the adopted son of Panchanon Roy. The decree-holder has not got any decree against Ashi Bhusan Dasi and he is not entitled to ask that her name be substituted in the place of Surendra Nath Roy. If we were to give effect to the contention of the decree-holder, the result would be really a new decree in his favour against Ashi Bhusan Dasi. But it has been argued that she is bound by the decree against Surendra Nath Roy, the alleged adopted son, because she acted as his *guardian-ad-litem*. It is plain however that she is in no way bound by the decree made against Surendra Nath Roy : *Mohunt Das v. Nil Komul Dewan* (1) and *Joy Chandra Banerjee*

CIVIL.

1919.

Ashi Bhusan Dasi

v.
Pelaram Mandal,

May, 23.

CIVIL.

1918.

Ashi Bhushan Dasi

Polaram Mandal.

Mookerjee, J.

v. *Srinath Chatterjee* (2). The remedy of the decree-holder may possibly be by way of a suit against Ashi Bhushan Dasi, if it be still open to him to sue her successfully in view of the provisions of the statute of limitation ; but it is clear that it is not competent to him to execute the decree against Ashi Bhushan Dasi.

The result is that this Rule is made absolute and the order of the Court below set aside. The sale will stand cancelled. The petitioner is entitled to his costs of this Rule. We assess the hearing fee at one gold mohur.

A. T. M.

Rule made absolute.

(2) (1904) I L. B. 82 Calo. 857.

PRIVY COUNCIL.

PRESENT : *Lord Atkinson, Lord Parker of Waddington,
Sir Samuel Griffith, Sir John Edge and
Mr. Ameer Ali.*

VAITHINATHA PILLAI

v.

THE KING-EMPEROR.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Criminal proceedings—Grave and substantial injustice—Reliable evidence, want of—Inadmissible evidence, reception of—Evidence of motive—Statement made in the absence of an accused, when admissible—Informer's evidence—Confession—Non-production of evidence as to the circumstances of an informer's arrest and confession, effect of—Rejection of a story designedly made to fit into another, effect of—Statements, which are intentions, evidentiary value of—Costs, when the Crown is party—Privy Council, jurisdiction of.

P. O.
1918.
June, 16, 17, 18, 19.
and
July, 24.

If in an appeal against a conviction their Lordships came to the conclusion that in the prosecution of the appellant "by some disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, some substantial and grave injustice has been done," then whatever doubts they may have of the appellant's innocence, or whatever suspicion they may entertain of his guilt, or however great may be their reluctance to interfere with, or overrule the decisions of the Indian Courts in criminal matters, they are bound humbly to advise His Majesty that the conviction should not be allowed to stand.

In re Abraham Mallory Dillal (1) followed.

Where the appellant was convicted of abetment of murder and sentenced to death and it appeared that a vast body of wholly inadmissible evidence, hearsay and other, had been admitted; that when admitted it has been used to the grave prejudice of the appellant, and that at the end of the hearing before the trial Judge there did not exist any reliable evidence upon which a capital conviction could be safely or justly based:

Held, that the conviction and sentence should not be allowed to stand.

Held also, that by admitting a piece of inadmissible evidence and using it to prove the appellant's consciousness of guilt and his desire to destroy the evidence of his crime, a grave and substantial injustice was done to him.

However strong and convincing the evidence of an adequate motive may be, that evidence can never counteract the harm done by the reception of inadmissible evidence, or the injustice its use may lead to, nor by itself supply the want of all reliable evidence, direct or circumstantial, of the commission of the crime with which an accused person may be charged.

A statement made in the absence of the accused is not admissible without first adducing evidence to show that the accused had himself instructed the person, making the statement, to make it, or directly or indirectly authorised any one to make it for him or on his behalf, or that the accused knew anything about it.

P. O.

1913.

Vaitlinatha Pillai

v.

King-Emperor.

An informer, who was arrested by the police, made a confession before a Magistrate implicating the appellant, other accused persons and himself. At the trial, when he was produced as a witness for the prosecution, he deposed that he was asked by the police to make the confession and that the story told by him in that confession was false. But the next day he withdrew his evidence of the preceding day and gave evidence in terms of his confession :

Held, that everything connected with the confession was, as far as the appellant was concerned, was done in the dark, that it was not without reason that the appellant's Counsel bitterly complained of the great injustice done to the appellant inasmuch as the officer who arrested the informer was not produced, nor was any witness produced by whose cross-examination the defence could have had an opportunity of ascertaining at whose instance he was arrested, or how his confession came to be made, or what inducements, if any, were held out to him to make it, and that the informer's evidence should be taken as struck out of the record, but though struck out, it must reflect back upon the evidence of another witness, whose story was designedly made to harmonize and fit into the informer's story.

When two stories told by two witnesses are designedly made to harmonize and fit into each other, the fact that one of them is rejected as incredible must necessarily affect the reliability of the other.

When forgetfulness on the part of a witness is out of the question and no confusion produced by the most skilful cross-examination can account for the statements which must either be the witness's own inventions or the inventions of others repeated by him with knowledge of their character, the witness's evidence is wholly unreliable and should be completely disregarded.

When the Crown is a party to an appeal, the general rule is that the Crown neither pays nor receives costs, unless the case is governed by some local statute or there are exceptional circumstances justifying a departure from the general rule.

Johnson v. Rex (1) followed.

Appeal by special leave, against two orders of the High Court at Madras, respectively dated the 19th June and 5th August, 1912, affirming an order of the Additional Sessions Judge of Tanjore, dated the 1st April, 1912, whereby the appellant was convicted of the abetment of the murder of his daughter-in-law named Dhanam, and was sentenced to death.

The facts of the case are sufficiently stated in the judgment of their Lordships.

Sir Robert Finlay, K. C., Arthur Grey, and S. Swaminadhan for the Appellant : The only direct evidence is of two witnesses. One of them was an approver. The English rule is that the Court cannot act on the evidence of an approver unless it is corroborated.

(*Sir Erle Richards* referred to section 133 of the Indian Evidence Act)

[SIR JOHN EDGE referred to *Queen-Empress v. Gobardhan* (1), and the Indian Evidence Act, section 114, illustration (b).]

[LORD PARKER referred to *Rex v. Milapa Bin Kapana* (2).]

The approver, however, is not believed by the Sessions Judge and also by the High Court Judges.

(*Sir Erle Richards*: In view of the findings of the High Court I cannot rely on the evidence of the approver. In a case of this kind it would not be fair to rely upon anything that is discarded by the High Court.)

That being so, it is not necessary to read his evidence, which must wholly be disregarded. But that does not remove the prejudice created in the case by his evidence and the procedure connected with his arrest and the circumstances of recording his confession. The result of the confession was that all the persons, who would have given material evidence for the appellant, were arrested and charged. Accused persons are competent to give evidence, though they can make statements.

[LORD ATKINSON: What is the authority for that? Section 342 of the Code of Criminal Procedure. The confession was recorded in the absence of the accused and was not admissible.]

[LORD ATKINSON referred to section 288 of the Code of Criminal Procedure.]

In the absence of any evidence as to how the approver was arrested and in view of the fact that the police-officer who arrested him was not called, the inference is irresistible that the police knew before they arrested him that he was prepared to make a statement implicating the appellant and others, and that having known that, they arrested him and got his so-called confession after several days. When they got this so-called confession, they got Aiyasami, the only other witness who gives direct evidence, to give evidence to corroborate the alleged confession. Aiyasami has given conflicting stories and his evidence should also be rejected altogether. When the evidence of these two witnesses is rejected, there remains no evidence sufficient to support the conviction.

[LORD ATKINSON: A. B. C. and D are tried together for the same offence and B. C. and D. are acquitted because there is not sufficient evidence to justify their conviction. How can A

P. O.

1913.

Valthinatha Pillai

King-Emperor.

P. O.

1918.

Vaithinatha Pillai

v.

King-Emperor.

be convicted on the same evidence? There must be further evidence to justify his conviction.]

There is no further evidence against the appellant. But the learned Judges say that there is strong evidence of motive in his case. It is, however, submitted that evidence of motive alone cannot supply the want of reliable evidence of the commission of the crime. They were also of opinion that there was proof of the appellant's consciousness of guilt. But the evidence on which this finding rests is wholly inadmissible and grave injustice has been done to the appellant by its admission. It is submitted that the conviction is contrary to natural justice and that it should be set aside. Reference was also made to sections 302 and 114 of the Indian Penal Code.

Sir Eric Richards, K. C., Kenworthy Brown and E. R. Osborne, for the Respondent : The real question is whether there is sufficient evidence to sustain the conviction.

Aiyasami's evidence is amply corroborated. Improper admission of evidence is not a ground of itself to set aside the conviction, if independently of such evidence, there is sufficient evidence to justify the conviction : Indian Evidence Act, section 167. It is submitted that there is sufficient evidence to support the conviction here.

[LORD ATKINSON referred to *In re Abraham Mallory Dillet* (1), and asked : If there is substantial and grave miscarriage of justice, can you say that the Board cannot intervene ?]

[SIR SAMUEL GRIFFITH referred to *Makin v. Attorney-General for New South Wales* (2).]

The jurisdiction of the Board is not questioned. But it is the settled practice of the Board not to intervene on the ground that a wrong view of the evidence is taken, or that there is misdirection by a Judge in leaving a case to the jury where there is no evidence. The Board has refused to give special leave to appeal in a criminal case where there was a miscarriage of justice on the ground that the consequences of entertaining it would be entirely destructive of the administration of all criminal jurisprudence : *The Falkland Islands Company v. The Queen* (3), *Ex-parte MacCrea* (4) and *Reg v. Bertrand* (5). In dealing with this case a precedent should not be created to open the door too wide for appeals in criminal cases from India and the Colonies. No

(1) (1887) L. R. 12 A. C. 459. (2) L. B. (1894) A. C. 57.

(3) (1868) L. M. P. O. C. 299, at p. 812.

(4) (1893) L. B. 20 I. A. 90, L. R. 15 All. 810.

(5) (1867) L. B. I. P. O. A. C. 520.

substantial and grave injustice of the kind stated in the case of *In re Dillet* (1), is done here to the appellant.

In that case the Chief Justice, who tried the case, in his charge to the jury made reference to the general conduct of the accused about which there was no evidence, and the conviction was set aside. But here there is sufficient evidence, and the only question is what inferences should be drawn therefrom. The Judges below were acquainted with and were the best Judges of the local habit, opinions and feelings, and the Board should not interfere with their decision simply because it is possible to draw inferences different from those drawn by the Judges below: *Ishingumusi v. The Attorney-General for the Colony of Natal* (2). Reference was also made to *Ex-parte Edith May Hallowel Carew* (3), *Nelson v. Rex* (4) and the Code of Criminal Procedure, section 209; and the Indian Evidence Act, section 157.

Sir Robert Finlay, K. C., Arthur Grey, and S. Swaminadhan were not called upon to reply.

The judgment of their Lordships was delivered by

Lord Atkinson.—During the lengthened hearing of this case their Lordships have had full opportunity of making themselves thoroughly familiar with the evidence and of giving all due consideration to the weighty arguments that have been addressed to them with great force and ability by Counsel on both sides. They have availed themselves of that opportunity and they have had no difficulty, under these circumstances, in making up their minds as to the advice which they feel it will be their imperative duty humbly to tender to His Majesty. As the appellant now lies under sentence of death their Lordships think it would only be humane and proper to announce at once what their advice will be. Their Lordships, while fully alive to the great undesirability of disturbing the judgments of the Criminal Courts in India, are clearly of opinion that in the present case, owing in the main to the reception of wholly inadmissible evidence, the use made of that evidence when admitted to the grave prejudice of the accused, coupled with the absence of all reliable evidence of the appellant's guilt, substantial and grave injustice has been done in convicting him of the crime of which he has been convicted, and therefore, that that conviction cannot stand. The case they think comes well within the principle laid down, over 25 years ago, in

P. O.

1918.

Vaithinatha Pillai
v.
King-Emperor.

June, 19.

(1) (1897) L. R. 12 A. C. 45.

(8) (1897) L. R. A. C. 719.

(2) (1906) L. R. A. C. 248.

(4) (1903) L. R. A. C. 250.

P. O.

1912.

Vaitthinatha Pillai

v.

King-Emperor.

Lord Atkinson.

Dillet's case (1) a principle by which the action of this Board has been guided ever since. That is the nature of the advice which their Lordships will tender, and on a future occasion they will give, more at length the reasons which have led them to the conclusion which they have arrived at.

SIR R. FINLAY: My Lords I should like to mention the question of the costs of the appeal.

LORD ATKINSON: This was considered before and in the case of *Johnson v. The King* (2) the head note is this "In future the Board will adhere to the practice of the House of Lords and the rule as to costs in cases between the Crown and a subject will be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule."

It does not seem to me that this is such a case. That was not, of course, a criminal case, but the rule seems to be laid down broadly there, and I do not know on what principle costs should be awarded against the Crown.

SIR R. FINLAY: I have asked, and I am informed that there is no local statute. The circumstances here however are very special. The appellant has been wrongly convicted and has been obliged to come here for the purpose of getting justice; the Crown has appeared in the case. I ask your Lordships to consider whether the circumstances are not special.

LORD ATKINSON: Your client is a wealthy man. I do not know that we can do anything. There is no authority for it and no precedent and I do not think we ought to make a precedent.

The reasons for their Lordships' report were delivered by

July, 24.

Lord Atkinson.—The appellant in this case was, by the Additional Sessions Judge of Tanjore, convicted on the 1st of April 1912 of the abetment of the murder of his daughter-in-law named Dhanam, wife of his son Aiyasami, and was sentenced to death. By two orders of the High Court of Judicature at Madras, dated respectively the 19th of June and 5th of August 1912, this conviction and sentence was confirmed. The two Judges of the High Court before whom the conviction came for confirmation, namely, Bakewell and Sadasiva Aiyar, JJ., differed in opinion. The case was then, under the 378th section of the Code of Criminal Procedure, referred to a third Judge, Sankaran Nair, J. and these orders are practically the orders of Bakewell, J., and the last-named Judge. This appeal has been taken from these

(1) (1887) L. B. 12 A. C. 459.

(2) (1904) A. O. 817 at 825.

latter orders. In the view which their Lordships take of the case it will be quite unnecessary to deal with many of the topics discussed at great length both in the Court of the Sessions Judge and the High Court. For instance, many witnesses were examined to prove that the appellant had some motive to procure the murder of his daughter-in-law which, however inadequate to tempt ordinary human beings to commit such a crime, was quite sufficient to tempt a person such as the appellant, with his views, opinions and passions, to commit it. The motive suggested was in the main this, that the son was greatly under the influence of his wife, the stronger character of the two, and was by her instigated to insist on her husband's right to the partition of certain lands between the members of the family, on the ground that they were the property of a joint Hindu family, while the appellant insisted that he had himself acquired them.

A minor and subsidiary motive was also suggested, which consisted in this, that the father gave an asylum in his house to a daughter named Thanga Babu—a child widow as she was styled, that is, a girl who had married when she was only ten years old and lost her husband by death before they had ever lived together as man and wife. Unfortunately this woman had lapsed, or was alleged to have lapsed, from virtue, and the deceased woman, considering apparently that the reputation of the family would be compromised by the presence of the erring one in her father's home, refused to live there unless the sinner was compelled to leave. In order to satisfy these scruples the appellant had sent this woman away, but permitted her to return to him. It was proved that this action caused, as was but natural, feelings of hostility and ill-will to be entertained towards the deceased by Thanga Babu. Both the Sessions Judge and the Judges of the High Court appear to have thought that these facts might well have furnished the appellant with a motive not only strong enough to lead him to procure the murder of his daughter-in-law, but of such overmastering force as to embolden him, to run the risk of killing her in the open reckless manner suggested in the case, in the presence, and with the aid, of four or five accessories, in whose power he would thus absolutely put himself. These learned Judges, it was urged, are well acquainted with, and are the best Judges of, the habits, opinions, and feelings of the race and class to which the appellant and his family belong, as well as of those

P. C.

1918.

Vaithinatha Pillai

King-Emperor,

Lord Atkinson.

P. O.

1918.

Vaithinatha Pillai

King-Emperor.

Lord Atkinson.

in the midst of whom they lived. However this may be, their Lordships think it safer, on the whole, to accept, for the purposes of this appeal, the conclusion at which they have arrived on this point. If, however, motive impels so irresistibly persons such as these to the commission of serious crime, it is difficult to see why the enmity existing between Thanga Babu and the deceased, caused as it was, might not also have moved this insulted woman to procure, or aid in, the removal of her enemy by foul means. But however these things may be, and however strong and convincing the evidence of an adequate motive may be, that evidence can never counteract the harm done by the reception of inadmissible evidence, or the injustice its use may lead to, nor by itself supply the want of all reliable evidence, direct or circumstantial, of the commission of the crime with which an accused person may be charged.

Their Lordships desire to abstain, as far as possible, from expressing any opinion upon either the guilt or innocence of any of the persons who have been accused of aiding in this murder, or upon the credibility of any witness who was not a witness against the appellant. Their task is to determine whether in the prosecution of the appellant—to use the words of Lord Watson when delivering the judgment of this Board in *Dillet's case*, (1) “by some disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, some substantial and grave injustice has been done.” If they come to the conclusion that injustice of that kind has been done, then whatever doubts they may have of the appellant's innocence, or whatever suspicions they may entertain of his guilt, or however great may be their reluctance to interfere with, or overrule the decisions of the Indian Courts in criminal matters, they think they are bound humbly to advise His Majesty that the conviction should not be allowed to stand.

Their Lordships have come to the conclusion that injustice of the kind mentioned has in this case been done, mainly owing to this, that a vast body of wholly inadmissible evidence, hearsay and other, has been admitted; that when admitted, it has been used to the grave prejudice of the accused; and that at the end of the hearing before the Judge of first instance there did not exist any reliable evidence upon which a capital conviction could be safely or justly based. The fact that their Lordships found their judgment on these points relieves them from the necessity of examining in detail any portions of the voluminous evidence not directly bearing upon them.

(1) (1887) 12 A. C. 459.

The appellant is a wealthy and apparently respectable landholder of good position, living at the village of Pandi, in the Tanjore District of Madras. Aiyasami is the son of his third wife. He was brought up by his paternal uncle, one Sami Thevan, a village Munsif, and was at the time of the trial about 25 or 26 years of age. He is described by the Sessions Judge as dull and weak-minded, and an effort was made to show that from his temperament and character, as well as from some past exhibitions of unprovoked and unreasoning violence, he was a man likely to have an attack of homicidal mania. His wife, the deceased woman, was also a member of a respectable family. She was apparently a resolute and clever woman, about 22 years of age, and had acquired considerable ascendancy over her husband. There were two children of the marriage, both alive, and aged respectively about four and one and a half years. For six or seven years previous to the year 1911 he and she had been living with her relatives in a village in the neighbourhood of Pandi. The father and the son were upon bad terms. At length, by the intervention of friends, a reconciliation was to some extent effected, and Aiyasami, his wife, and two children went on the 13th of September, 1911, to reside in the appellant's house, to see, it was stated, whether they would get on together; one of the terms, however, insisted upon by them was that Thanga Babu should not be permitted to reside in her father's house. It is not disputed that Aiyasami and his wife retired together to rest on the night of the 22nd of October in their father's house, and that she was, during the night and before dawn, murdered with the most brutal and savage ferocity. Thirteen wounds were found to have been inflicted upon her body, all upon the left side, some few slight, but most of them very severe, and many such as could only have been inflicted with some sharp instrument used with very great force. For instance, wound No. 2 was an incised wound an inch long, half an inch wide, and half an inch deep over the left temple. Another, No. 3, a quarter of an inch long, one-eighth inch wide, one-eighth deep just behind the left ear, the lobe of the ear being cut off. No. 4, a cut three inches long, half an inch wide, and half an inch deep on the up part of the neck on the left side, dividing the local blood-vessels in its course. No. 6, a transverse cut three inches long and half an inch wide, extending down to the bone on the left side of the lower jaw, and five or six other wounds of almost equal severity. Such a wound as

P. O.
 1918.
 Vaithinatha Pillai
 King-Emperor.
 Lord Atkinson.

P. C.

1918.

Vaithinatha Pillai

v.

King-Emperor.

Lord Atkinson.

No. 4 would, according to the evidence of Colonel Hasell Wright, an Army medical officer, examined as a witness, have probably rendered the woman unconscious and unable to talk or walk, as also probably would have wound No. 9. Wound No. 1 would, he thought, probably have stunned her if caused by the weapon called an *aruval*, or bill hook then shown to him, and the fact that the wounds were all transverse would point, in his opinion, to their having been inflicted by one man in the light, not by two men in the dark, while the absence of wounds on the hands of the deceased would indicate that the woman was murdered in her sleep rather than while struggling to protect herself.

On the 23rd of October 1911, the day after the murder, an inquest was held upon her body and a verdict returned by the jury that Aiyasami Pillai, her husband, had murdered her with a blood-stained *aruval* then produced to them. This weapon had been found in the place where the deceased woman had slept, had been taken possession of by the police, and was produced at the inquest. On the 22nd of November 1911, Aiyasami Pillai was brought before the Second Class Magistrate at Tiruturaipandi in the Tanjore district, charged with the murder of his wife, with the view apparently of his being returned for trial for the crime. The depositions of several witnesses, including that of an old woman, Mutachi, his grand-mother, then an inmate of the house, were taken. She deposed that during the night she heard a noise like a thud, got up, went to where Aiyasami was sleeping, found him sitting on a cot on the right side of the bed and cutting his wife with an *aruval*; that she said to him "Boy, what do you cut?" and cried out, "He has killed, he has killed," that the baby then sleeping in the cot woke up, and that there was blood but no wounds upon it. The Magistrate, instead of returning the accused for trial, stated he disbelieved the evidence against him, admitted him to bail, and next day, the 28th, discharged him from custody. In delivering judgment he said "The defence theory is not completely before me. It goes to show that the deceased was obnoxious to the accused Thanga Babu, and she, Thanga Babu, decoyed her into the cattle shed, or back yard, and gave her into the hands of the accused's father and satellites, who brutally killed her, and laid her out in her bed and forcibly put a bloody cloth on the accused and accused him of murder." According to the defence the murder took place about midnight. The Magistrate wound up by saying that "All these circumstances point the suspicion against the accused's

father, step-sister, step-brother Kalyanam, the servant Kathiresan, and others. This will be further investigated." Aiyasami was the only person who had been charged. There is no proof that the defence to which the Magistrate refers as put forward on his behalf was not put forward at his instigation or with his concurrence. It differs in every particular from the account subsequently deposed to by him. This Magistrate had no doubt jurisdiction to take the course he actually took, but the discharge is not an acquittal. Aiyasami might have been tried again; he, to use the words of the Sessional Judge, "was not safe," at the time of the subsequent trial, and one of the results of his discharge under the circumstances was necessarily this, that he was subjected up to and during the trial to a tremendous temptation to endeavour to put the halter round his father's neck in order to save his own. That circumstance can never be lost sight of in estimating the value to be attached to the evidence he subsequently gave.

On the 27th November, the day previous to the delivery of this pronouncement, this same Magistrate had ordered the arrest of Thanga Babu, Kathiresan, the appellant's servant, and Kalyanam, his son.

On the 2nd of December, the appellant's wife, Kanthimati Achi, and Avani Konan were also arrested. Ultimately every inmate of the appellant's house was arrested, with the consequence that their mouths were closed, since, though accused persons may make a statement, and the Judge or Magistrate may put questions to them, they cannot be examined as witnesses on their own behalf. On the 27th October the second class Magistrate of Tituraipandi took from Aiyasami a statement, not on oath, which was ultimately put in evidence by the prosecuting counsel at the trial in corroboration, it was said, of the former's evidence, although it is in many respects inconsistent with it. It is printed at page 115 of the Record. In it he states that he, his son (the baby), and his wife, the deceased, had gone to bed, that his wife lay with her head northwards, the child in the middle, and he on the eastern side; that Kanthimati Achi, the wife of the accused, Thanga Babu, his sister, and Kalyanam, his brother, were pressing down his wife; that his father, the appellant, cut her with one stroke; that he went near his father and said "don't cut, leave off," and that the blood spurted on a red cloth he was wearing at the time, and stained it; that his father and brother Kalyanam said;

P. O.

1918.

Vaithinatha Pillai

v.

King-Emperor.

Lord Atkinson.

P. O.

1918.

Valthinatha Pillai

v.
King-Emperor.

Lord Atkinson.

"You catch hold of that fellow, and keep him," that thereupon the two servants Kathiresan and Avani, and one Somu, the son of an employé or agent of the appellant, caught hold of him and kept him; that ten or fifteen minutes after he was caught hold of and thus kept, they all came out to where he was; that while he was kept under restraint the noise continued to be heard, and that at dawn he went and saw that other cuts had been inflicted on his wife. This, having regard to what followed, is in many respects a most important statement. *First*, it was proved in the case and was admitted in argument before their Lordships that the statement that at the time his wife was murdered he was wearing this red loincloth was untrue. It was proved to be his cloth, but it was also proved that the cloth he wore the night his wife was murdered was a white cloth. *Secondly*, he does not state that a man Thiagan was present on the occasion of the murder or took any part in the proceedings. *Thirdly*, he made no suggestion that his wife was removed from the room where she lay before she was killed. On the contrary, the fair meaning of his words would rather appear to be that she was murdered where she lay. Well, on the 6th of December 1911, this Thiagan was arrested by, as appears from exhibit "G," p. 143, Detective-Inspector D. S. Krishnasami Ayar, and next day brought before this same Magistrate. He was kept in custody, and on the 28th of that month the Magistrate writes to his superior officer I. T. Gillespie, exhibit 23, p. 170, to announce that Thiagan had made a full confession implicating the appellant and the other prisoners, corroborating the evidence given by Saminatha Pillai in the previous enquiry, and implicating the informant himself. On the 14th of December following a statement was taken from this man by V. S. Narayan Row, a second class Magistrate, and he was subsequently, on the 18th of March 1912, examined as a witness at the trial. The story told in the confession is strange and revolting. He brings upon the scene his brother Somu as well as himself, all or almost all of the inmates of the appellant's household, and two unnamed strangers unknown to him. He represents that he himself, his brother Somu, Kathiresan, and Avani, the two servants, by the orders of the appellant took away Aiyasami to a second compartment and tied him there, Avani being left in charge with directions, given by the appellant, to hack him if he talked. That Somu, Kathiresan, and himself then returned to where deceased was, that the appellant's wife Kanthemati pressed down the shoulders of the deceased, that

Kalyanam, the son, closed her mouth, that by the appellant's directions Kalyanam and Kathiresan lifted the woman by the head side, he and Somu by the feet, and, conducted by the appellant, and followed, with a light, by Thanga Babu, carried her into the cow-shed, and laid her down at the foot of an orange tree ; that the two unknown men were standing there ; that the appellant then said to these men "do your business," that thereupon one of them, coming to the right side, cut the deceased between the ear and the right shoulder with an *aruval*, that the appellant then addressed these nameless men, saying, "you men despatch the business soon," and thereupon the men proceeded to hack the deceased to death, that subsequently the appellant said to him, "there is a dyed cloth ; take it. Aiyasami is now wearing on his waist a white cloth ; take it off and dress him with this dyed cloth," and that he, Thiagan, subsequently did so. This last statement, it will be observed, is in direct contradiction to the statement made by Aiyasami on the 27th of October, already referred to, who, when asked to explain how bloodstains had got on the red dyed loincloth taken from him, replied that when his father (the appellant) cut the deceased with one stroke her blood spurted out upon it.

This man was on the 18th of March examined as a witness. He stated he did not see the appellant the night of the murder, that he did not go to his house that night, that Mutachi had told him Aiyasami had cut his wife, and that he did not see anyone cutting her. He was thereupon, by the permission of the Court, cross-examined by the Public Prosecutor.

The cross-examination ran as follows :

(By permission of Court, cross-examined by Public Prosecutor).

Q.—Were you examined by the Nidamangalam Sub-Magistrate ?

A.—Yes.

Q.—Did he record what you said ?

A.—I deposed before him as I was tutored by the police.

Q.—Did you tell him that ?

A.—I was asked by the police not to say so.

Q.—Did you tell the Magistrate the truth ?

A.—I told him what the police told me.

Q.—Was it the truth ?

A.—The only truth is what I have said Mutachi told.

Q.—Did you tell the Sub-Magistrate what Mutachi told you ?

P. O.

1918.

Vaithinatha Pillai

v.

King-Emperor.

Lord Atkinson.

P. O.

1912.

Vaithinatha Pillai

v.

King-Emperor.

Lord Atkinson.

A.—I did not, as I was asked by the police not to say so.

Q.—Everything that you told the Sub-Magistrate was false?

A.—I told him what I was asked to say. I was asked to speak falsely and I spoke falsely.

These being his replies, his confession (Exhibit "O") was read over and filed as evidence. Next day, on being brought into Court, still in custody, he volunteered that on the day before, when he saw the Court and people, he was afraid, and that he now wished to speak the truth. But he was never asked, either by the Court or Counsel on either side, to name the officer or officers of the police who asked him to give false evidence. The officer who arrested him was not produced, nor was any witness produced by whose cross-examination the defence would have had an opportunity of ascertaining at whose instance he was arrested, or how this confession came to be made, or what inducements, if any, were held out to him to make it. Everything connected with it was, as far as the appellant was concerned, done in the dark. And Sir Robert Finlay, who opened this appeal, complained bitterly, and, in their Lordships' view, not without reason, of the great injustice done to the accused by the adoption of such a course of procedure. The Sessions Judge most naturally and rightly came to the conclusion (p. 188) that it would be unsafe to accept any portion of the approver's story without independent corroboration. Mr. Justice Bakewell thought that no reliance could be placed upon it. And the third learned Judge who heard the case said (p. 233) that the informer's evidence was not relied upon before him. Sir Erle Richards, quite rightly, in their Lordships' view, early in the argument, stated he did not intend to rely upon it. This evidence may therefore be taken as struck out of the record, but though struck out, it leaves its taint behind it, and reflects back upon the evidence of Aiyasami, the only other witness who gives direct testimony as to the commission of the crime by the appellant, for this, amongst other reasons, that on the 18th of January 1912, three weeks after the informer's confession had been taken, Aiyasami had himself made a deposition, evidently designed and intended to corroborate the informer's story. In it he brings upon the scene the informer, whom before that he had never mentioned as having been present.

The statement that the informer had tied the red cloth round him after all was over conforms with latter's story though it is in conflict with his own previous account, and the further

statement that he had been tied to a pillar, never made before, was obviously introduced for the same purpose. The stories told by both these men are thus designedly made to harmonize and fit into each other. When one story is rejected as incredible the reliability of the other is necessarily affected. He (Aiyasami) was examined as a witness at the trial on the 21st March, 1912. He then stated that his statement given to the Magistrate G. S. Vaukhinathar Ayar on the 27th of October 1911 was not true; that the Inspector Krishna Ayar "troubled" him to make it, that he saw this Inspector in the gaol seven or eight times before he made it. In cross-examination he said that he told the Magistrate he lay with his head to the north, because the Sub-Inspector told him to say so; that the Sub-Inspector said it would be a good thing for him to say that, but that he did not mention why, that it was not true that he was lying on the east side of his wife. He further said it was false that his father cut his wife with one stroke, that the Inspector told him to say so, that he told the Sub-Magistrate that he had omitted the name of the informer in his statement made on the 27th of October 1911 (Exhibit S), because the Sub-Inspector had asked him to do so, that he had told the Magistrate that the Sub-Inspector had told him to suppress Thiagan's name, but did not ask him to suppress Somu's name. He further stated that it was the Sub-Inspector who told him to say that he saw his father cut his wife, and also to say that the murder was on the cot in the room. He admitted that he had denied to the Sub-Magistrate the statement that the Sub-Inspector had told him to mention the name of the person who killed his wife, but that he did this at the dictation of the Sub-Inspector. Several charges of less importance were made by the witness against this Sub-Inspector and this Sub-Magistrate. These latter were examined as witnesses and denied them all. If true they show that these officials or at least the Sub-Inspector induced the witness to forswear himself, and found in him a pliant instrument ready to give false evidence upon oath to secure the conviction of his own father, and, if false, they show that the witness was ready to commit, and did commit deliberate perjury whenever he was confronted with the inconsistencies in his former statements.

There is no alternative. Forgetfulness is, their Lordships think, out of the question, and no confusion produced by the most skilful cross-examination can account for statements which

P. O.
1918.
Vaithinatha Pillai
v.
King-Emperor.
Lord Atkinson.

P. C.
 1918.
 Vaithinatha Pillai
 v.
 King-Emperor.
 Lord Atkinson.

must either be the witness's own inventions, or the inventions of others repeated by him with knowledge of their character. In either event their Lordships are clearly of opinion that this witness's evidence is wholly unreliable, and should be disregarded as completely as that of the informer.

The learned Sessions Judge appears himself to have taken a similar view of this man's evidence, at least to a large extent. When referring to it, at page 188, he said :—" But though I do not wish to apply a meticulous standard to his evidence I do not think it will bear the test of examination." And so fully does he appear to have been convinced of this that he acquitted and ordered to be discharged three of the persons whom Aiyasami had expressly charged with being active aiders and abettors in the murder.

Sir Erle Richards urged upon their Lordships the danger of disturbing the verdicts of Judges in criminal Courts in India, who, having seen and heard the witnesses, had believed them, and founded their decision upon their testimony. Their Lordships are fully alive to those considerations. But this is emphatically not a case of that character. It is precisely the reverse of that. Here the Judge who heard and saw the witness did not think his evidence so reliable that he could act upon it alone.

If he had thought it reliable he could not have ordered the discharge of the three prisoners implicated by it. His statement is very explicit (page 200) : " I do not think that there is sufficient evidence to establish beyond doubt how or where the murder was actually committed, or that either Kathiresan or Avani or Thanga Babu assisted in it, though it is highly probable that the former were amongst the agents employed by the first accused. I therefore acquit them and discharge them."

The learned Sessions Judge based his conviction of the appellant on five specific findings, as he styles them. These are all stated by him at bottom of page 199, and top of page 200 of the Record, and are as follows : 1. That the murder must have been committed by some of the inmates of the appellant's house that night. 2. That the clothes, *i. e.*, the two loin cloths which were spotted with blood, afforded conclusive proof that more than one man assisted in the murder. 3. That the account given by the appellant and his mother-in-law (*i. e.*, Mutachi) were demonstrably inconsistent with facts. 4. That the appellant's conduct after the murder indicated a guilty conscience.

5. That he was the only one of the inmates of the house who is proved to have had any motive to murder Dhanam.

Their Lordships do not think that this last conclusion necessarily follows from the evidence. As to the first, if the learned Sessions Judge had said that the murder must have been committed either by or with the connivance or assistance of some of the inmates of the appellant's house, their Lordships would be inclined to concur with him. The second finding is, they think, a *nonsequitur*. It assumes that the two cloths, both of which belonged to Aiyasami, could not have been worn by him at two different stages in this outrage, and must at the time of the murder have been worn by two different men. But Aiyasami never said so; on the contrary he first stated he had worn the red one at the time of the murder, and that his wife's blood spurted on to it when his father cut her with one stroke. Then he swore that he wore the white cloth on that night, and that the red one was put on him by the approver by his father's directions. This theory is in direct variance with every one of Aiyasami's statements. If the cloth not worn at the time the murder was committed was in the compartment where the deceased and her husband slept it may well have got her blood upon it, much of which must have been shed. If he changed his clothes after the murder the second might well have got stained in this room. There is no evidence where the clothes not in use were kept. If in the room where the murder was committed they might well have been stained with spots of blood as they have been found to be, and, besides, spots of blood might have got on one of them from other sources. Moreover the proof, as is usual in such cases, only established that the blood was mammalian blood.

As to the third finding their Lordships would quite concur with the Sessions Judge if it is to be assumed that the story told by the informer and Aiyasami is true, but they fail to find anything in these accounts to show they are demonstrably inconsistent with the facts on any other assumption. The fourth finding opens up a wide field. A large body of inadmissible evidence, hearsay and other, was admitted, some unimportant in bearing and effect, some very prejudicial to the accused. Statements made in the absence of all the accused, such as the conversation between Sami Tevan and Aiyasami, in which the latter was urged to say nothing about the murder and to compromise with his father, and statements made in the absence of

P. O.
1918.
Vaithinatha Pillai
King-Emperor.
Lord Atkinson.

P. O.
1913.
Valthinatha Pillai
v.
King-Emperor.
Lord Atkinson.

some of the accused but in the presence of others were lumped together and used, *in globo*, apparently, against all. But this finding is based in the main upon a piece of evidence which was utterly inadmissible, and which, when admitted, was pressed home by the prosecution against the accused with great effect, and, as is evident from the judgments, wrought the greatest injustice. It is this, messengers were sent not by the accused, but by a friend, to announce the death of the deceased to some friends and acquaintances of the family in another village. These messengers told some persons to whom they spoke that the deceased woman had died of cholera. The rumour spread. The person who sent the messengers was sworn and examined. He denied that he had ever instructed them to make such a statement. Not a particle of evidence was adduced to show that the appellant had himself instructed these messengers to make this statement, or directly or indirectly ever authorised anyone to make it for him or on his behalf or that he knew anything about it. Yet, without the foundation for admitting these statements ever having been laid, they were admitted in evidence, and because the bodies of persons who die of cholera in India are almost immediately cremated to avoid the spread of infection, were relied upon by the prosecution and accepted by some of the Judges who considered this case, as clear and convincing proofs of the appellant's consciousness of guilt, and of his desire (in one instance it is styled an attempt) to destroy the evidence of his crime.

It appears to their Lordships that a grave and substantial injustice was done to the appellant in admitting and thus using this piece of inadmissible evidence. The two other matters relied upon as proofs of the accused's guilty conscience are first a conversation about the cremation of the remains, the ordinary way of disposing of the bodies of dead Hindus in India, which was perfectly innocent on its face, and may well have had reference to nothing more than the funeral which was to take place in due course. The rumour of the death by Cholera was permitted to reflect back, however on this simple incident, and in the eyes of the Sessions Judge gave to it a guilty complexion. In their Lordships' view this piece of evidence gives no support whatever to the fourth finding. The other incident relied upon to support the finding is this : Sami Thevan, the village Munsiff, who entertained no friendly feeling towards the appellant, was sent for before 6 o'clock in the morning. He arrived at the

appellant's house about 6 a. m. He was shown the body of the deceased, saw Aiyasami and took a statement from the appellant, and gave it to the police five or six days later, but the police were not communicated with for some hours, and did not arrive on the scene till about 11 o'clock. It was contended that the room in which the deceased slept had by that time been arranged, and the body of the deceased placed in a position it could not have occupied at the time of the murder. This may well be, but many people had access to the room as well as the appellant.

P. C.

1913.

Vaithinatha Pillai

v.

King-Emperor

Lord Atkinson.

There is no evidence that he himself did, or procured to be done to the body any of these things. The matter specially pressed against him is the tardiness of the communication with the police. Their Lordships think that in this case that is rather a negative circumstance. Whether the father himself committed the murder or the son committed it, eagerness to communicate with the police could not well be expected from him. The following passage from the judgment of the Sessions Judge deserves attention. It runs thus (p. 200): "On these findings (the five preceding) I convict first accused (*i.e.*, the appellant), Vaithinatha Pillai, of abetment of murder punishable under section 302 read with either 109 or 114, Indian Penal Code, since he is said to be physically incapable of having inflicted the injuries with his own hand." Lieut.-Colonel Wright had deposed that wound No. 4 would probably have rendered the woman unconscious, that it might have been inflicted with a weapon such as the *arnaval* shown to him, but that he had examined the appellant, that he had a badly united fracture of the bone of the right fore-arm, and that his hand was more or less deformed, and that, considering the state of his right arm, he could not have inflicted this wound.

What their Lordships presume the learned Sessions Judge meant by this paragraph is this, that the appellant did not himself inflict the blows, but of course if the case against him has any truth in it, he was a principal.

The facts so found by the Sessions Judge furnish in his view the corroboration of the evidence of Aiyasami which rendered it reliable as against his father, though unreliable against the other three persons accused. In their Lordships' view, the inferences which the Sessions Judge has drawn from the evidence and embodied in these findings cannot reasonably be drawn from it. They think that the evidence reasonably interpreted affords no corroboration at all of Aiyasami's story.

P. O.

1918.

Vaithinatha Pillai

King-Emperor.

Lord Atkinson.

The so-called circumstantial evidence in their opinion in no way strengthens the direct evidence, which, as already stated, cannot be relied upon, and for these with the other reasons already mentioned, they think that the conviction of the accused should not be allowed to stand. And they have humbly advised his Majesty accordingly.

T. L. Wilson & Co.—Solicitors for the appellant.

The Solicitor, India Office.—Solicitor for the Respondent.

J. M. P.

Appeal allowed.

PRESENT: *Lord Atkinson, Lord Parker of Waddington,
Sir Samuel Griffith, Sir John Edge and Mr. Ameer Ali.*

KUNWAR PARTAB SINGH AND ANOTHER

v.

BHABUTI SINGH.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF OUDH.]

Decree, setting aside of—Minor unrepresented—Compromise on behalf of a minor in a suit—Code of Civil Procedure, (Act XIV of 1882), Secs. 441, 443 and 448—Guardian for suit—Specific Relief Act (1 of 1877), Sec. 42—Civil Procedure Code (Act V of 1908), Sec. 98—Third Judge, duty of.

In cases to which section 443 of the Code of Civil Procedure, 1882, applies it is not sufficient proof that the exigencies of the section were complied with to show that the minor was described in the title to the suit as a minor "under the guardianship of a person named" and that the terms of the compromise were before the Court, but there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown, by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained. In the absence of evidence to that effect the compromise and the decree made in pursuance thereof must be declared not binding on the minor, who should be remitted to his original position.

Manohar Lal v. Jada Nath Singh (1) followed.

Where two minor defendants were described in the title of the suit as minors 'under the guardianship of H,' but no order was made by the Court as required by section 443 of the Code of Civil Procedure, 1882, appointing the said H guardian for the suit for the said minors:

Held, that the said minors were not in law represented in the said suit.

The words 'guardian for the suit' in section 441 of the Code of Civil Procedure, 1882, mean the guardian for the suit for a minor appointed by the Court as required by section 443 thereof.

Section 42 of the Specific Relief Act does not apply to a suit instituted by the plaintiffs seeking a declaration that a decree made in a previous suit,

P. O.

1918.

June, 30
July, 23.

where they were minors, was not binding on them and claiming to be restored to the position which they held prior to the date of the decree.

When there is a reference under section 98 of the Code of Civil Procedure, 1908, the third Judge should confine himself to a consideration of a point of law only.

Appeal from a decree of the Court of the Judicial Commissioner of Oudh, dated the 14th March 1910, reversing a decree of the Court of the Subordinate Judge of Sitapur, dated the 29th July 1908.

The suit was instituted by the appellants, as plaintiffs, for a declaration that an agreement of compromise, dated the 15th December 1899, entered into on their behalf during their minority and two decrees based thereon and made in two previous suits, were not binding on the plaintiffs. The Court of first instance decreed the suit, but the Court of appeal dismissed it.

The facts are sufficiently stated in the judgment of their Lordships.

Arthur Grey and *R. Jacob*, for the Appellants: In the suit of the 26th June 1899 there is no evidence that the Court made an order under section 443 of the Code of Civil Procedure, 1882, appointing *Hari Pershad* as guardian for the suit for the minors, who must therefore be held to have been unrepresented in that suit. There is no evidence even of an application for the appointment of a guardian for the suit supported by an affidavit under section 456 of the Code. The decree made in that suit is liable to be discharged under section 444 of the Code as against the minors, who were not represented. Again in both suits of 1899 it was not brought to the notice of the Court that the minors were parties to the compromise and no leave of the Court was obtained to compromise the suits on behalf of the minors as required by section 462 of the Code. Consequently the compromise and the decrees made in pursuance of it are not binding on the appellants: *Manohar Lal v. Jadu Nath Singh* (1). It was also decided in that case that the plaintiff who was in a position similar to that of the appellants, was entitled to a declaration that the compromise and the decree were not binding upon him and that he should be remitted to his original position. Hence the appellants have claimed the right relief and section 42 of the Specific Relief Act, has no application.

(*Mr. DeGruyther, K. C.*: I concede that in this case that section has no application.)

P. O

1918.

Partab Singh

Bhabuti Singh.

P. O.

1918.

Partab Singh

v.
Bhabuti Singh.

If, however, there is any case for the exercise of discretion, it is submitted that the case is one in which the Court should exercise its discretion: *Isri Dut Koer v. Mussumut Hansbutti Koerain* (1).

The exercise of the discretion of the Court to grant or to refuse relief to the appellants is not a point of law within the meaning of section 98 of the Code of Civil Procedure, 1908 and the Judicial Commissioners who heard the appeal not having differed on any question of law, the appeal should have been dismissed under that section.

In any case, the learned Judges having delivered their judgments as judgments of the Court without any reservation, had no power thereafter to refer a point of law if any, to a third Judge: *Lal Singh v. Ghansham Singh* (2). Under the Code of 1882, section 575, when two Judges differed, the whole case was referred to a third Judge. But under the Code of 1908, section 98 they are empowered to refer only a question of law to a third Judge, who cannot deal with the whole case. The judgment of the third Judge was therefore wholly irrelevant to the appeal except on the question whether section 42 of the Specific Relief Act, 1877, applied.

Lastly, on the facts found by the Courts below the appellants are entitled to the relief prayed.

DeGruyther, K. C., and *G. R. Lowndes*, for the Respondent: The decree made in the suit of 27th July 1899 should not be set aside in the absence of any evidence to show that it was not instituted *bona fide* in the interests of the appellants, and that the dismissal thereof was procured by fraud upon the appellants by the respondent. Again if that suit had been fought out there is nothing to show that the appellants would have been able to take advantage of any decree that might have been made therein in their favour. Its dismissal therefore is not shown to have been prejudicial to the then interests of the appellants. Reference was also made to the Oudh Laws Act (XVIII. of 1876) sections 6 and 9.

The compromise was before the Court, which passed decrees in both suits after considering its effect on the interests of the minors, who are, therefore, bound by those decrees.

Gray replied.

The judgment of their Lordships was delivered by

Sir John Edge.—The suit in which this appeal from a

(1) (1888) L. B. 10 I. A. 150 (156); L. L. B. 10 Calo. 324.

(2) (1887) L. L. B. 9 All. 625.

decree of the Court of the Judicial Commissioner of Qudh has arisen was brought by Kunwar Partab Singh and Kunwar Ahbaran Singh in the Court of the Subordinate Judge of Sitapur against Bhabuti Singh and others on the 22nd February 1908. The plaintiffs, who are the appellants here, sought by their suit to have it declared that a decree which was made on the 15th December 1899 in a suit for pre-emption which had been brought by Bhabuti Singh, who is respondent here, on the 26th June 1899 against certain vendees and others, and in which the appellants, who were then minors, had been added as defendants, was not binding as against them. The plaintiffs appellants also sought in this suit to have a decree set aside which had been made on the 15th December 1899 in a suit for pre-emption which had been brought on the 27th July 1899 by them under the guardianship of one Hari Pershad against vendees and others and in which Bhabuti Singh had been added as a defendant, and they claimed to be restored to the position which they had held prior to the 15th December 1899 and such other relief as they were entitled to.

The material facts which their Lordships find are briefly as follows. The plaintiffs were the sons of Raja Balbhaddar Singh who died on the 27th December 1897. The property of the joint family consisted of, amongst other things, shares in mahal Ismailganj and mahal Khushalpur, in respect of which Raja Balbhaddar Singh was at his death recorded in the revenue papers as the proprietor. After the death of Raja Balbhaddar Singh the defendant respondent, Bhabuti Singh, assuming to act as the guardian of the plaintiffs and as the manager of their property obtained in April 1898 mutation of names in the revenue papers in their favour. Syed Mohammad Ismail, Syed Idrur Hasan and Syed Mohammad Sadig on the 3rd August 1898 sold certain shares in mahal Ismailganj and mahal Khushalpur to Munshi Niaz Ahmad, Babu Ram and Bhagwan Das. It was in respect of that sale that the suits for pre-emption of the 26th June 1899 and the 27th July 1899 were brought. The vendors and the vendees were original defendants to these suits. Bhabuti Singh had a right of pre-emption equal but not superior to the right of pre-emption of Partab Singh and Ahbaran Singh in respect of the shares which were sold in mahal Khushalpur, and he had a right of pre-emption inferior to theirs in respect of the shares which were sold in mahal Ismailganj. It is obvious that the interests of the minors Partab Singh and Ahbaran conflicted

P. O.

1918.

Partab Singh

v.

Bhabuti Singh.

Sir John Ridge.

P. C.

1913.

Partab Singh

v.

Bhabuti Singh.

Sir John Ridge.

with the interests of Bhabuti Singh. On the 26th June 1899 Bhabuti Singh on his own behalf brought a suit to pre-empt the shares which had been sold in the two mahals, and made the vendors and vendees defendants to the suit. On the 5th August 1899 Bhabuti Singh caused Partab Singh and Ahbaran Singh, who were then minors, to be added as defendants to that suit. According to the amended plaint, Partab Singh and Ahbaran Singh, minors, under the guardianship of Hari Pershad, were added as defendants under an order dated 5th August 1899. The Court appears to have made an order on the 5th August 1899 that Partab Singh and Ahbaran Singh should be added as defendants, but it does not appear that the Court had ordered that they should be added as defendants under the guardianship of Hari Pershad. The amendment of the plaint adding Partab Singh and Ahbaran as defendants was not attested by the signature of the Judge. No order appointing Hari Pershad as a guardian for the suit for Partab Singh or Ahbaran Singh was applied for or was made. By section 443 of the Code of Civil Procedure, 1882, it was enacted that :

"Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the suit."

By section 441 of the same Code it was enacted that :

"Every application to the Court on behalf of a minor (other than an application under section 449) shall be made by his next friend, or by his guardian for the suit."

The result is that the minors, Partab Singh and Ahbaran Singh, were not in law represented in the suit which was brought by Bhabuti Singh.

On the 27th July 1899 Bhabuti Singh, who was then the *de facto* guardian of the minors Partab Singh and Ahbaran Singh, and the manager of their property, caused a suit for pre-emption in respect of the sale of the 3rd August 1898 to be brought by Partab Singh and Ahbaran Singh under the guardianship of Hari Pershad against the same vendors and vendees who were defendants to the suit of the 26th June 1899. The shares which it was sought to pre-empt by the suit of the 27th July 1899 were the same shares which it had been sought to pre-empt by the suit of the 26th June 1899. On the 7th August 1899 Bhabuti Singh was added as a defendant to the suit of the 27th

July 1899. On the 27th July 1899 Hari Pershad had in the suit in which Partab Singh and Ahbaran Singh were the plaintiffs filed an application to be appointed their *guardian ad litem*. The application purported to be made under section 456 of the Code of Civil Procedure, 1882. The Subordinate Judge to whom the application was made by his order of the 27th July 1899 held that the application was unnecessary, and directed that the costs should be borne by the plaintiffs in that suit in any event.

Bhabuti Singh, the vendors, the vendees, and Hari Pershad, professing to act on behalf of Partab Singh and Ahbaran Singh, entered into an agreement of compromise, and on the 15th December 1899 filed in the suit in which Bhabuti Singh was the plaintiff a petition in which it was stated that it was agreed that Bhabuti Singh should pay Rs. 15,000 without costs to the vendees, and that a decree for possession of the property sold should be passed in favour of Bhabuti Singh by right of pre-emption. On that petition the then Subordinate Judge passed a decree in that suit in favour of Bhabuti Singh. As Hari Pershad had not been appointed guardian for the suit for the minors Partab Singh and Ahbaran Singh, they were in law unrepresented, and the decree did not bind them. Further, Hari Pershad had not obtained the leave of the Court to enter into that agreement of compromise on behalf of the minors Partab Singh and Ahbaran Singh.

In pursuance of the agreement of compromise to which their Lordships have referred, Hari Pershad, professing to act as guardian of the minors Partab Singh and Ahbaran Singh, on the 15th December, 1899, presented to the Court a petition in the suit in which Partab Singh and Ahbaran Singh were the plaintiffs, in which it was stated that it had been settled between the parties that a decree should be passed in favour of Bhabuti Singh in his suit; that the compromise had been filed in Court; and that Partab Singh and Bhabuti Singh were willing to withdraw their claim; and it was prayed that the withdrawal of their claim should be sanctioned, and that their suit should be dismissed. That petition was signed by Hari Pershad, Bhabuti Singh, the vendors, and the vendees. Hari Pershad appeared in Court in support of that petition, and stated that: "Since Bhabuti Singh has acquired this *hakkiat* on the basis of pre-emption, therefore the minors have now no objection, and they do not advance a claim to the said *hakkiat* as against Bhabuti Singh." On that petition the then Subordinate Judge dismissed the suit of Partab Singh and Ahbaran Singh. It does not appear

P. C.

1913.

Partab Singh

Bhabuti Singh.

Sir John Edge.

P. O.

1913.

Partab Singh

vs.
Bhabuti Singh.Sir John ~~Edga.~~

that the Subordinate Judge was informed that the minors Partab Singh and Ahbaran Singh were in law unrepresented in the suit of the 26th June, 1899, in which Bhabuti Singh had obtained a decree as against them and others for the pre-emption of the shares which Pratab singh and Ahbaran Singh were in their suit claiming to pre-empt; nor does it appear that the Subordinate Judge was informed that the petition for the dismissal of the suit of Partab Singh and Ahbaran Singh was made in pursuance of an agreement of compromise which Hari Pershad acting as next friend of the minors Partab Singh and Ahbaran Singh, had entered into without the leave of the Court. This Board has held in *Manohar Lal v. Fadu Nath Singh and others* (1), that in cases to which section 462 of the Code of Civil Procedure, 1882, applies there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown, by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained, and that it is not sufficient proof that the exigencies of section 462 were complied with to show that the minor was described in the title of the suit as a minor, as in that case, suing "under the guardianship of his mother," and that the terms of the compromise were before the Court. The agreement of compromise in pursuance of which Hari Pershad obtained the dismissal of the suit of Partab Singh and Ahbaran Singh was void as against them and on that ground, if there were no other, they are entitled to have the decree dismissing the suit of the 27th July, 1899, set aside.

Hari Pershad had been a *karinda* of Raja Balbhaddar Singh, and he acted in a subordinate capacity under Bhabuti Singh in the management of the property of Partab Singh and Ahbaran Singh after Bhabuti Singh assumed the guardianship of the minors. Their Lordships agreed with the learned Judicial Commissioner that in the proceedings to which they have referred "Hari Pershad was a mere dummy, that there was no one to protect the interests of the plaintiffs (Partab Singh and Ahbaran Singh), and that in fact Bhabuti Singh took advantage of his position." Their Lordships find that Hari Pershad was introduced into the suits of 1899 by Bhabuti Singh as the guardian or next friend of the minors Partab Singh and Ahbaran Singh to advance the interests of Bhabuti Singh and to defeat the interests of Partab Singh and Ahbaran Singh, for whom previously and

(1) (1896) L. R. 83 I. A. 128.

subsequently Bhabuti Singh was acting as guardian and as the manager of their property. Hari Pershad throughout acted under the directions and on behalf of Bhabuti Singh and in his interests and contrary to the interests of Partab Singh and Ahbaran Singh, and to their detriment. Upon these findings of fact it follows as an obvious conclusion that the compromise and the proceedings which were taken in pursuance of it were not binding upon Partab Singh and Ahbaran Singh, and it is clear, apart from the other considerations which their Lordships have already discussed, that Partab Singh and Ahbaran Singh are also on these findings of fact entitled to relief.

The Subordinate Judge of Sitapur in this suit gave Partab Singh and Ahbaran Singh a decree on the 29th July, 1908. From that decree Bhabuti Singh appealed to the Court of the Judicial Commissioner of Oudh. The appeal was heard by a bench consisting of the Judicial Commissioner and the first Additional Judicial Commissioner. The learned Judicial Commissioner, on the facts found by him, held that Partab Singh and Ahbaran Singh were entitled to the decree which they had obtained from the Subordinate Judge, and that the appeal shall be dismissed with costs. The first Additional Judicial Commissioner agreed with the findings of the Judicial Commissioner on all the material facts. In his judgment the first Additional Judicial Commissioner stated :—

"I agree with my learned colleague in holding that it is satisfactorily established that the appellant [Bhabuti Singh] was *de facto* manager of the minors' property at that time [1899], and that Hari Pershad in withdrawing the minors' suit acted under his instructions. If the case had been fought out the minors [Partab Singh and Ahbaran Singh] would probably have obtained a decree for the larger portion of the property and lots might have been drawn with respect to a smaller portion thereof. In arranging for this compromise the appellant acted in his own interests, and the reason why he got a pre-emptive suit instituted on behalf of the minors was to protect himself in case other persons who had a better right of pre-emption than himself instituted suits claiming pre-emption of the property. After the period of limitation for such suits had expired he withdrew the minors' claim and obtained a decree in his own favour."

Notwithstanding that finding the first Additional Commissioner, for reasons which appear to their Lordships to be irrelevant, considered that exercising a discretion under section 42 of the

P.O.

1918.

Partab Singh

Bhabuti Singh.

Sir John Bage.

P. O.

1918.

Partab Singh

Bhabuti Singh.

Sir John Edge.

Specific Relief Act, 1877, he ought to refuse to grant the relief for which Partab Singh and Ahbaran Singh had prayed, and held that the appeal should be allowed and the suit dismissed with costs. Section 42 of the Specific Relief Act, 1877, did not apply. The Judicial Commissioner and the first Additional Judicial Commissioner having differed in opinion on the point of law as to whether section 42 of the Specific Relief Act, 1877, applied to the case, directed that the appeal should be laid before the second Additional Judicial Commissioner under section 98 of the Code of Civil Procedure, 1908. The second Additional Judicial Commissioner did not apparently confine himself to a consideration of the point of law with which alone he had under section 98 of the Code of Civil Procedure, 1908, jurisdiction to deal; he apparently agreed with the opinion of the first Additional Judicial Commissioner that section 42 of the Specific Relief Act, 1877, applied, and held that the appeal should be allowed and the suit should be dismissed with costs in both Courts. In accordance with the opinions of the first Additional Commissioner and the second Additional Judicial Commissioner a decree was passed on the 14th March, 1910, by the Court of the Judicial Commissioner of Oudh allowing the appeal and dismissing the suit with costs. From that decree this appeal has been brought.

Their Lordships are of opinion that this appeal should be allowed and the decree of the Court of the Judicial Commissioner should be set aside, and that the appellants, Partab Singh, and Ahbaran Singh should have a decree setting aside the decree of the 15th December, 1899, in their suit, and declaring that the agreement of compromise and the decree of the 15th December, 1899 in the suit of Bhabuti Singh are not binding upon them or either of them, and that they are entitled to such rights as they had before their suit was dismissed on the 15th December, 1899. Their Lordships will advise His Majesty accordingly. Bhabuti Singh the respondent must pay the costs of this appeal and of his appeal to the Court of the Judicial Commissioner of Oudh.

Ranken Ford, Ford & Chester.—Solicitors for the Appellants.

T. L. Wilson & Co.—Solicitors for the Respondent.

J. M. P.

Appeal allowed.

PRESENT : *Lord Atkinson, Lord Parker of Waddington,
Sir Samuel Griffith, Sir John Edge and
Mr. Ameer Ali.*

SRI RAJA VENKATA NARASIMHA APPA ROW

v.

SRI RAJA PARTHASARATHY APPA ROW SAVAI
ASWA ROW AND ANOTHER

(No. 114 of 1910).

SRI RAJA VENKATADRI APPA ROW

v.

SRI RAJA VENKATA NARASIMHA APPA ROW
AND ANOTHER

(No. 115 of 1910)

and

SRI RAJA VENKATADRI APPA ROW

v.

SRI RAJA PARTHASARATHY APPA ROW SAVAI
ASWA ROW AND ANOTHER.

(No. 116 of 1910).

[CONSOLIDATED APPEALS FROM THE HIGH COURT OF
JUDICATURE AT MADRAS.]

Hindu Law—Succession—Zemindari—Madras Regulation (XXV of 1802).

A zemindari, which is the subject of a *sanad* in common form under the Madras Regulation XXV of 1802, is partible and descendible according to the ordinary rules of inheritance of the Hindu law, unless the *sanad* could operate as the confirmation of a previously existing estate which from its nature or by virtue of some special family custom was impartible and descendible to a single heir.

Where the question was whether the zemindari of Nidadavole, which was the subject of a *sanad* in common form under the Madras Regulation XXV of 1802, was impartible, and no reliance was placed on any special family custom but it was contended that the grantee under the *sanad* had at and prior to the date thereof an estate which was of the nature of a Raj or principality and therefore impartible :

Held, affirming the Courts below, that the zemindari in question was not in the nature of a Raj, and that it was partible and descendible according to the ordinary rules of inheritance of the Hindu law.

Collector of Trichinopoly v. Lekhamani (1), *Kachi Kalligana v. Kachi Yava* (2), *Raja Venkata Narayana Appa Row v. Raja Narayana Appa Row* (3), *Babu Ganesh Dutt Singh v. Maharaja Mohashur Singh* (4), *Srimant Raja Yariagadda Millikarjuna v. Srimant Raja Yariagadda Durga* (5) and *Allen v. Quaboo Warehouses Company* (6) relied on.

(1) (1874) L. B. 1 I. A. 282 (806); 14 B. L. R. 115.

(2) (1905) L. B. 32 I. A. 281; I. L. R. 28 Mad. 508.

(3) (1879) L. B. 7 I. A. 88; I. L. R. 2 Mad. 128.

(4) (1855) 6 M. I. A. 164 (187).

(5) (1890) L. B. 17 I. A. 154; I. L. R. 13 Mad. 406.

(6) (1886) L. B. 13 A. O. 101 (104).

P.O.

1913.

June 23, 24, 25,
26 & 27.
and
July, 24.

P. O.

1918.

Venkata Narasimha

Appa Row

Parthasarathy Appa

Row.

Three consolidated appeals from judgments and decrees of the High Court at Madras (November 20, 1905) affirming decrees of the Court of the Subordinate Judge of Kistna (December 2, 1899), and modifying decrees of the Court of the District Judge of Godaveri (December 12, 1903).

The judgment of their Lordships deals with only one of the questions involved in these appeals, which are adjourned for further hearing of other questions involved therein. The question decided is whether the zemindari of Nidadavole in the Madras Presidency is impartible or not. This zemindari at one time formed a part of the great zemindari of Nuzvid. But at the time of the permanent settlement in 1802 the Government separated it from the larger zemindari and granted a *sanad* thereof in common form under the Madras Regulation XXV of 1802 to one Venkata Narasimha, a brother of the zemindar of Nuzvid. In 1879 their Lordships of the Judicial Committee decided that the zemindari of Nuzvid was partible: see *Raja Venkata Narasimha Appa Row v. Raja Natayya Appa Row* (1).

On December 13, 1899, Parthasarathy instituted one of the two suits giving rise to these appeals in the Court of the District Judge of Godaveri against Rangayya and Venkata Narasimha as defendants. The plaintiff contended *inter alia* that the zemindari of Nidadavole, which was in the possession of the defendant Rangayya was partible and that he was entitled to a third share thereof, and he claimed possession of that share. The defendant Rangayya pleaded *inter alia* that the zemindari in question was impartible. The District Judge found that at and prior to 1802 the zemindari was not in the nature of a Raj or principality and held that it was partible. On appeal this decision was upheld by the High Court: See *Sri Raja Venkata Narasimha Appa Row v. Sri Raja Rangayya Appa Row* (2).

DeGruyther, K. C. and *Dunne*, for Venkatadri representing Rangayya: The first question is whether the zemindari of Nidadavole was at or prior to 1802 when the *sanad* was granted, impartible. The evidence establishes that it was impartible. It is an ancient zemindari and not a single one of the ancient zemindaries has been held partible. The official records show that the estate was of the nature of a Raj: Manual of the Kistna District p. 90, Fifth Report of the Select Committee on the affairs of the East India Company, 1812. (Madras ed.) pp. 5, 6, 21, 54, 88, 180, 181 and 205; "Standing Information regarding the official administration of the Madras Presidency in each

(1) (1879) L. R. 7 I. A. 38; I. L. B. 2 Mad. 128.

(2) (1906) I. L. B. 29 Mad. 487.

Department, in illustration of the Yearly Administrative Reports," by C. D. Maclean, 2nd ed. (1879). p. 100. The holder of the estate is called a zemindar and there is no distinction between a zemindari and a poliem which is always impartible: *The Collector of Trichinopoly v. Lekkamani* (1), *Kachi Kalyana Rengappa Kalakka Thola Udayar v. Kachi Yava Rengayya Kalakka Thola Udayar* (2) and *Naragunty Lutchmeedavami v. Vengama Naidoo* (3). The zemindar like the poligar had to render military service and was a petty chief, whose estate is of the nature of a Raj. If an estate belongs to a class of possessions which are in the nature of chieftainships or an estate is in the nature of a Raj, it is impartible. *Mutta Vaduganadhan Tevar v. Dorasinga Tevar* (4) and *Babu Gunesb Dutt Singh v. Maharaja Moheshur Singh and others* (5).

Every member of the family has stated at one time or another that the estate is impartible. These statements are contained in the genealogical tables, which are admissible. Similar statements in similar tables have been accepted as proper evidence of the impartibility of an estate: *Shree Rajah Yanumula Venkayamah v. Shree Rajah Yanumula Boochia Vankendra* (6) Indian Evidence Act, sections 32 and 90. The estate was prior to 1802 impartible and the grant of a *sanad* under the Madras Regulation XXV of 1802 does not alter its character of impartibility: *Srimantu Raja Yarlagadda Mallikarjuna v. Srimantu Raja Yarlagadda Durga* (7): This is an ejectment suit and the onus is on the other side to show that the estate is partible and it is submitted that that onus is not discharged. Reference was also made to *Rajah Venkata Narasimha Appa Row Bahadur v. Rajah Narayya Appa Row Bahadur* (8), *Babu Beer Pertab Sahas v. Maharajah Rajender Pertab Sahas* (9), *Ramnundan Singh v. Maharani Fanki Koer* (10), *Alexander John Forbes v. Meer Mahomed Toquee* (11), *Kooldeep Narain Singh v. The Government* (12), *Baboo Gunesb Dutt Singh v. Maharaja Moheshur Singh* (13). Wilson's

P. O.

1918.

Venkata Narasimha
Appa Row
v.
Parthasarathy Appa
Row.

- (1) (1874) L. R. 11 A. 232 (818); 14 B. L. R. 115.
- (2) 1903 L. R. 32 I. A. 261; 1 L. R. 28 Mad. 508.
- (3) 1881 9 M. I. A. 66 (86, 86).
- (4) 1881 L. R. 8 I. A. 99 (111 & 112); 1 L. R. 8 Mad. 290.
- (5) 1855 6 M. I. A. 164 (187, 188 & 189).
- (6) (1870) 18 M. I. A. 383, (839).
- (7) 1890 L. R. 17 I. A. 134; 1 L. R. 18 Mad. 408.
- (8) 1879 L. R. 7 I. A. 88; 1 L. R. 2 Mad. 128.
- (9) 1867 12 M. I. A. 1, (18, 34 & 35).
- (10) 1902 L. R. 29 I. A. 178 (193).
- (11) 1870 18 M. I. A. 438.
- (12) 1871 14 M. I. A. 247.
- (13) 1856 6 M. I. A. 164.

P. O.

1918.

Venkata Narasimha
Appa Row
r.
Parthasarathy Appa
Row.

Glossary pp. 481 and 563 for explanation of Sibandi and the rights of zemindar, and Harington's Analysis of the Bengal Regulations, Vol. III, pp. 368 and 370.

Sir Robert Finlay, K. C., (*Kenworthy Brown and Swaminadhan with him*), for the representative of Venkata Narasimha : The estate is descendible according to the ordinary rules of inheritance of the Hindu Law, unless the contrary is established and the burden of establishing the exception is on the opposite side. It is contended that it is not partible as it is an ancient zemindari of the nature of Raj. But even an ancient zemindari is partible unless it is established that it is a Raj or that a binding family custom making it impartible is established ; *zemindar of Merangi v. Sri Rajah Satrucharla Ramabhadra Rasu* (1), *Baboo Gunesh Dutt Singh v. Moharajah Maheshur Singh* (2) and *Mayne on Hindu Law and Usage*, 7th ed., p 632. The question whether an estate is subject to the ordinary Hindu Law of succession or descends according to some exception thereto is a question of fact and must be decided in each case according to the evidence given in it ; *Srimantu Raja Yarlagadda Mallikarjuna v. Srimantu Raja Yarlagadda Durga* (3), and *Kaliyana Rengappa Kalakka Thola Udayar v. Kachi Yuva Rengappa Kalakka Thota Udayar* (4). It is not contended that in this case there is a family custom of impartibility, but it is contended that the estate is in the nature of a Raj and therefore impartible.

But both Courts below have found that it is not a Raj and this concurrent finding should not be disturbed as it is not shown that it is not justified on the evidence : *Allen v. Quebec Warehouse* (5), *Owners of the "P. Caland" and Freight v. Glamorgan Steamship Co. Ltd.* (6), *Ram Anugra Narain Singh v. Chowdhry Hanuman Sahai* (7), *Parbati Kunwar v. Chandarpal Kunwar* (8), *Sajjad Hussain v. Wasir Ali Khan* (9); *Karuppanan Servai v. Srinivasan Chetti* (10), and the Code of Civil Procedure (Act XIV of 1882), section 596. Hence the estate is partible. Reference was also made to the Fifth Report, pp. 4 to 7, Appendix (Grant's Reports) p. 50 and Glossary, p. 50 (zemindar) and Willson's Glossary for the meaning of Raj.

(1) (1891) L. R. 18 I. A. 45 (58) ; I. L. R. 14 Mad. 287.

(2) (1855) 6 M. I. A. 164 (187).

(3) (1890) L. R. 17 I. A. 184 (144) ; I. L. R. 18 Mad. 406.

(4) (1905) L. R. 32 I. A. 261 (269) ; I. L. R. 28 Mad. 508.

(5) (1886) L. R. 12 A. O. 101.

(6) L. R. (1898) A. O. 207.

(7) (1902) L. R. 30 I. A. 41 ; I. L. R. 30 Calo. 803

(8) (1909) L. R. 36 I. A. 125 ; (184), I. L. R. 31 All. 457.

(9) (1912) L. R. 39 I. A. 156 (162) ; I. L. R. 34 All. 455.

(10) (1901) L. R. 29 I. A. 80 ; I. L. R. 25 Mad. 215.

Sir Erle Richards, K. C., Rose, K. C., and Mr. Nair, for Parthasarathy, adopted the argument of *Sir Robert Finlay K. C. DeGruyther K. C.*, replied.

The judgment of their Lordships was delivered by

P. O.

1918.

Venkata Narasimha

Appa Row

t.

Parthasarathy Appa

Row.

July, 24.

Lord Parker of Waddington.—The principles to be applied in determining the question which now arises for decision do not, in their Lordships' opinion, admit of any controversy. These principles may be stated as follows:—First, in the absence of a *sanad* under Regulation XXV of the Madras Regulations of 1802, those regulations do not affect the title to any land: *Collector of Trichinopoly v. Lekkamani* (1). Secondly, the acceptance of a *sanad* in common form under Regulation XXV does not of itself, and apart from other circumstances, avail to alter the succession to an hereditary estate: *Kachi Kaliyana v. Kachi Yava* (2). Thirdly, unless there be an existing estate with other incidents which a *sanad* in common form under Regulation XXV can operate to confirm such *sanad* will confer on or confirm in the grantee an estate descendible according to the ordinary rules of inheritance of the Hindoo law: *Raja Venkata Narasimha Appa Row v. Raja Narayya Appa Row* (3). Fourthly, in order to establish that any estate is descendible otherwise than in accordance with the ordinary rules of inheritance of the Hindoo law, it must be proved either that it is from its nature impartible and descendible to a single heir, or that it is so impartible and descendible by virtue of a special family custom: *Baboo Gunesh Dutt Singh v. Maharaja Moheshur Singh* (4). Lastly, the nature of the estate and the existence or otherwise of a special family custom are questions of fact to be determined on the evidence available in each case: *Srimantu Raja Yarlagadda Mallikarjuna v. Srimantu Raja Yarlagadda Durga* (5).

The question now arising for decision is whether the zamindari of Nidadavole is impartible and descendible to a single heir or partible and descendible according to the ordinary rules of inheritance of the Hindoo law. The zamindari of Nidadavole was the subject of a *sanad* in common form under Regulation XXV, and on the principles above stated it must be held to be partible and descendible according to the ordinary rules of inheritance of the Hindoo law, unless the *sanad* could

(1) (1874) 1 I. A. 282 (806); 14 B. L. R. 115.

(2) (1905) L. B. 32 I. A. 261; 1 I. L. B. 28 Mad. 508.

(3) (1879) L. R. 7 I. A. 58; 1 I. L. R. 2 Mad. 128.

(4) (1855) 6 Moo. I. A. 161 (187).

(5) (1890) L. B. 17 I. A. 134; 1 I. L. B. 18 Mad. 406.

P. C.

1918.

Venkata Narsimha
Appa RowParthasarathy Appa
Row.

Lord Parker.

operate as the confirmation of a previously existing state which from its nature or by virtue of some special family custom was impartible and descendible to a single heir. The appellant contends that the grantee under this *sanad* had at and prior to the date thereof an estate which was of the nature of a Raj or principality and therefore impartible. He does not rely on any special family custom. At and prior to the *sanad* the grantee thereunder had no doubt some estate, but whether or not it was an estate in the nature of a Raj is a question of fact to be determined on the evidence. Both Courts below have found that the estate was not in the nature of a Raj, and having regard to the ordinary practice of this Board it would be wrong to advise His Majesty to disturb this finding unless their Lordships are satisfied that it was not justified by the evidence: See *Allen v. Quebec Warehouse Company* (1). So far from being so satisfied, their Lordships after considering the evidence are not prepared to say that they should not themselves have come to the same conclusion. Some stress was laid on the contrary findings of the Courts in the litigation which culminated in the proceedings before the Board reported 7 Ind. App. 38, but their Lordships observe that in the present case there was evidence of a very material nature which was not available in the earlier litigation.

In their Lordships' opinion, therefore, the judgments of the Courts below cannot on this point be disturbed, and they will humbly advise His Majesty to that effect. They will consider the question of costs when the other points arising on these appeals have been dealt with.

Douglas Grant.—Attorney for Sri Rajah Venkadri.

T. L. Wilson & Co.—Solicitors for the representative of Sri Rajah Venkata Narsimha.

Chapman Walker & Shephard.—Solicitors for Sri Rajah Parthasarathy.

J. M. P.

Decision affirmed.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, Sir Richard Harington, Bart, Judge and Sir Asutosh Mookerjee, Knight, Judge.

BIBI AHMADI BEGUM AND OTHERS

v.

TARAK NATH GHOSE AND OTHERS.*

CIVIL.

1918.

January, 21, 22,
23, 24, 25, 26, 27,
and 31.
February, 3.
March, 18.

Fishery right—Easement—Limitation Act (IX of 1908), Secs 2, cl. (5), 23—Continuing wrong independent of contract—Burden of proof—Jalkar, existence of—Bed of river—Disconnection, temporary—Hunter's Statistical Accounts, reference if can be made.

A profit *a prendre*, such as a right of fishing in another's waters is an easement within the meaning of the term as defined in section 2 cl. (5) of the Indian Limitation Act. As a trespasser cannot by the very Act of trespass immediately and without acquiescence on the part of the owner become possessed of the property upon which he has trespassed, till the statutory period has elapsed, the wrongful act of the defendants in exercising right of fishery can only be deemed acts of trespass and being a case of a continuing wrong independent of contract, a fresh period of limitation, under section 23 of the Indian Limitation Act, begins to run at every moment of the time during which the wrong continues.

Chandoo v. Shib (1) and *Lokenath v. Jahanis* (2) referred to.

The proprietors of a permanently settled estate though proprietors of the territorial fisheries comprised within the ambit of their estate, are bound to prove the fact that the *jalkars*, at the time of the Permanent Settlement, formed part of the assets of their zamindari.

Furber v. Meer Mahomed Hossain (3) referred to.

Reference cannot legitimately be made to statements in Hunter's Statistical Accounts for the purpose of establishing the existence of private rights.

The bed of a river is that portion of the river which is in the ordinary and regular course of nature covered by the waters of a river. It need not be constantly covered if in the ordinary course of things it is habitually covered.

Howard v. Ingersoll (4), *Alabama v. Georgia* (5), *Hindson v. Ashby* (6) and *Thomas Conservatory v. Sneed & Co.* (7) referred to

The grantee of a fishery right in the river is entitled to fish in all waters comprised within the banks of the river, and the circumstance that a particular

* Letters Patent Appeal No. 1 of 1909 from a decision of Hon'ble Mr. Justice Richardson differing from that of Hon'ble Mr. Justice Doss, dated the 8th May, 1909, in Appeal from Original Decree No. 838 of 1906, against the decree of Babu Durga Das Bose, Officiating Additional Subordinate Judge of Bhagalpur, dated the 30th July, 1906.

(1) (1830) 1 L. R. 5 Oalc. 945; 6 O. L. R. 269.

(2) (1811) 14 O. L. J. 572.

(3) (1878) 12 B. L. R. 210; 20 W. R. 44; 2 Suther. P. C. 865.

(4) (1851) 18 Howard 381 (427).

(5) (1859) 28 Howard 505 (515).

(6) (1896) 1 Oh. 78 (84); (1896) 2 Oh. 1 (25).

(7) (1897) 2 Q. B. 384.

CIVIL.

1918.

Ahmadi Begum

Tarak Nath.

sheet of water may, during part of the year, be disconnected from the flowing stream or permanent current does not affect the rights of the grantee. A *jalkar* so situated in the river bed is essentially part of the river, and the fish contained therein may properly be deemed fish of the river.

Where the right of fishery is in a river, the Court has to be satisfied on a consideration of all the material facts and conditions whether it can fairly and reasonably be said that the waters over which the fishery is claimed are a part of the river.

Sarat Chandra v. Khutis Chandra (1) distinguished.

Appeal by the Plaintiffs.

Suit to recover possession of certain fisheries by virtue of ownership of the soil.

The plaintiffs, first party, were the proprietors in different rights of Mahal Tappah Madhuban, Pargana Kahalgaon, which is a permanently settled estate. The plaintiffs, second party, were *mustajirs* or lessees of the estate. It comprised amongst others, mouzas Kakarghat, Khizerpur, Imamnagar and Harinkole, each extending as far as its northern boundary. Partly within these mouzas and partly outside the northern limit of some of them, are some nine or ten lakes of narrow and elongated shapes more or less connected with each other and stretching from south-west to north-east over a distance of nearly five miles. The lakes situated in mouza Kakarghat on the west are known as Khanua Rajghat and Darbial; those in mouza Khizerpur in the middle are known as Dhaggar and Ghoremara, those in Imamnagar also in the middle and to the east of the former are known as Booriabharung, Khir Khira and Chaprela and those in Harinkole on the extreme north-east as Parthenia and Singiadhar. All these sheets of water locally bear the generic name of Bhorung, in consequence of the growth of aquatic plants in them.

The river Ganges flows far away to the north of these lakes and is at a distance of nearly four miles from the north-eastern lakes and six or seven miles from the south-western lakes. The tract which intervenes between these lakes and the channel of the river forms part of the permanently settled estates of other proprietors and consists partly of *bustee* lands, cultivated fields and lakes like those in suit. The land on the north of these lakes up to the channel of the river is lower in level than the land on the south of it. During the annual floods the whole of this area except the higher *bustee* lands is submerged under

water. When the floods recede, all communication between these lakes and the river ceases.

The plaintiffs claimed in these lakes, so far as they are situate within the boundaries of their permanently settled estate, a right of territorial fishery by virtue of ownership of the soil.

The defendants, first party, were the owners of a *jalkar mahal* in a section of the river Ganges known as *jalkar Maksuspur*, which also is a permanently settled estate. It extends from Mayagunge in the town of Bhagalpur on the west to the shrine of Hazrah Peer Shah Kamal in mouza Pir Painti (in tappah Madhuban) on the east and is about 40 miles in length. This right of fishery is in the nature of a servitude and is independent of ownership of the soil.

The defendants claimed a right of fishery in the disputed lakes by virtue of their right in *jalkar Maksuspur* and contended that they and their predecessors in interest had always been exercising a right of fishery in those lakes and that the plaintiffs had never exercised such right, nor had they ever been in possession of those lakes. They accordingly pleaded limitation and want of title in the plaintiffs.

The first Court decided both those pleas in favour of the defendants. An appeal by the plaintiffs to the High Court was heard by Mr. Justice Doss and Mr. Justice Richardson who delivered the following judgments :

Doss J.—This appeal arises out of an action to recover possession of certain fisheries by virtue of ownership of the soil.

The plaintiffs, first party, are the proprietors in different rights of *mahal* Tappah Madhuban, purgana Kahalgaon, which is permanently settled estate bearing Touzi No. 295 in the Collectorate of Bhagalpur and a *sudar jama* of Rs. 3,736. The plaintiffs, second party, are *mustajirs* or lessees of the estate. It comprises amongst others, mouzas Kakarghat, Khizerpur, Imamnagar and Harinkole, each extending as far as its northern boundary. Partly within these mouzas and partly outside the northern limit of some of them, are some nine or ten lakes of narrow and elongated shapes more or less connected with each other and stretching from south-west to north-east over a distance of nearly five miles. The lakes situated in mouzah Kakarghat on the west are known as Khanua Rajghat and Darbial; those in mouza Khizerpur in the middle are known as Dhaggar and Ghoremara, those in Imamnagar also in the middle and to

CIVIL.

1918.

Ahmad Bogum

Tarak Nath.

1909.

May, 5.

CIVIL.

1918.

Ahmadi Begum

v.

Tarak Nath.

Dow, J.

the east of the former are known as Booriabharung, Khir Khira and Chaprela and those in Horinkole on the extreme north-east as Parthenia and Singiadhar. All these sheets of water locally bear the generic name of Bhorung, in consequence of the growth of aquatic plants in them.

The river Ganges flows far away to the north of these lakes and is at a distance of near four miles from the north-eastern lakes and six or seven miles from the south-western lakes. The tract which intervenes between these lakes and the channel of the river forms part of the permanently settled estates of other proprietors and consists partly of *bustee* lands, cultivated fields and lakes like those in suit. The land on the north of these lakes up to the channel of the river is lower in level than the land on the south of it. During the annual floods the whole of this area except the higher *bustee* lands is submerged under water. When the floods recede, all communication between these lakes and the river ceases; and it is admitted on all hands that such communication has ceased since several years past.

The plaintiffs claim in these lakes, so far as they are situated within the boundaries of their permanently settled estate, a right of territorial fishery by virtue of ownership of the soil.

The defendants, first party, are the owners of a *jalkar mahal* in a section of the river Ganges known as *jalkar* Maksuspur, which also is a permanently settled estate bearing Touzi No. 271 in the Collectorate of Bhagalpur and a *sadar jama* of Rs. 923. It extends from Mayagunge in the town of Bhagalpur on the west to the shrine of Hazrah Peer Shah Kamal in mouza Pir Painthi (In Tappah Madhuban) on the east and is about 40 miles in length. This right of fishery is in the nature of a servitude and is independent of ownership of the soil. In order to contradistinguish this incorporeal right from the right of territorial fishery, it may be aptly described as a franchise fishery originating presumably in a grant from the ruling power for the time being. The defendant second party, is a lessee of this *jalkar* and the defendant third party, is a sublessee under her.

The defendants claim a right of fishery in the disputed lakes by virtue of their right in *jalkar* Maksuspur and they urge that they and their predecessors in interest have always been exercising a right of fishery in these lakes and that the plaintiffs have never exercised such right, nor have they ever been in possession of those lakes. They accordingly plead limitation and want of title in the plaintiffs.

The learned Subordinate Judge has decided both these pleas in favour of the defendants. The plaintiffs have accordingly appealed.

It appears that at the time of the permanent settlement one Roy Kripa Nath Chowdhury was the owner of Jalkar Maksuspur as appertaining to Mouza Maksuspur. Mouza Maksuspur formed part of his estate in Purgana Kolganj, which extended to a considerable distance along both banks of the river Ganges. Portion of this estate was soon after sold for arrears of revenue. *Jalkar* Maksuspur was sold separately and was purchased by one Bhowani Prosad for a sum of Rs. 960. In Exhibit 2, which is an attested copy of a letter dated 9th September 1799, addressed by the Collector of Bhagulpur to the Board of Revenue informing them of the nature and extent of the right which Bhowani Prosad had acquired under his purchase of *jalkar* Maksuspur; the *jalkar* is thus described: "In this estate," that is, Roy Kripa Nath's estate in the Purgana of Kolganj "was a *jalkar* and only one, named Maksuspur, and comprehending the entire stream between both banks of the Ganges and giving to the proprietor a right of preventing all fishermen who had not previously obtained from him a *potta*, or license entitling them to fish, from exercising their trade in such part of the Ganges as was bounded by Mouza Maksuspur on the one side and by the parallel bank on the other. But though this fishery obtained its name from Mouza Maksuspur, it formed a separate division or mehal." This letter of the Collector was accompanied by the written answers given by the canongoes to certain questions put by him relative to the proprietary right in, and to the extent of *jalkar* Maksuspur and therein the boundaries of the *jalkar* are thus described: "The fishery in question is bounded to the eastward by the westward extremity of Tappa Madhuban; to the westward by Mayagunge in Purgana Bhagalpur and to the northward and southward by the banks of the river, including not only the whole course of the river but all water, flowing or stagnant, on both banks.

It is contended on behalf of the appellant that too much weight ought not to be attached to the words "all water flowing or stagnant on both banks" contained as they are in the answer of the canongoes, but not to be found in the description of the *jalkar* by the Collector in his letter and that if any effect is to be given to them at all they must be construed as referring to all waters, flowing or stagnant, so long as there is a communica-

CIVIL.

1913.

Ahmadi Begum

v.

Tarak Nath.

Dosa, J

CIVIL
 1918.
 Ahmadi Begum
 v.
 Tarak Nath,
 Doss, J.

tion at all seasons of the year and not during the rains only, between them and the waters of the flowing river. I am of opinion that this contention is well-founded.

As I have already stated the river Ganges now flows at a distance of four miles from the north-eastern extremity of these lakes and nearly six miles from the south-western extremity ; and that all communication between these lakes and the flowing stream has ceased since several years past. The survey map of the Mouzas situated in this tract of country, and which was made in the years 1847-48, shows that the relative position of the flowing channel of the river and the lakes in dispute was then almost the same as it is now, and the evidence shows that this position has remained unchanged during the period which has elapsed since. The soil of these lakes is part and parcel of the permanently settled estates of private proprietors, and according to an uniform current of decisions of this Court and of the *sadar dewani adalat* [collected together in the Tagore Law Lectures for 1889 at page 374, to which may be added *Hem Chandra Chowdhury v. Jagadindra Nath Roy* (1), *Jogendra Narayan Roy v. Crawford* (2), and *Ishan Chandra Das v. Upendra Nath Ghose* (3)], the owner of a franchise fishery in a public navigable river possesses the right to fish in any neighbouring lake or *jhil* situated in private territory so long as such lake or *jhil* continues to be an arm or adjunct of the flowing stream, the test being whether communication between the lake or *jhil* and the flowing stream at all seasons of the year continues to exist. When this communication ceases, the lake or *jhil* ceases, to form an arm or adjunct of the river, it becomes freed from the servitude to which it was subject, the right of the proprietor of the soil is restored and he becomes entitled to enjoy its profits by catching fish or growing corn as there is water on it or not.

It has been contended by the respondent that *jalkar Maksuspur* is a fishery of a very peculiar character, that it is not similar to the class of fisheries dealt with in the reported cases nor to any which probably has ever come before the Courts, that it is an incorporeal right of fishery not confined to a section of the flowing river and its arms or adjuncts, but a right of fishery extending over and beyond either banks as far as the limits indicated by what, according to the defendants at one time formed its permanent high banks ; that the position of these limits is

(1) (1905) 9 O. W. N. 984.

(2) (1903) I. L. R. 82 Cal. 1141. (3), (1908) 12 O. W. N. 559.

unalterably fixed for ever and that the owner of the right of fishery has the right to fish in all lakes or pools of water situated within those limits; however far they may be situated from the flowing stream and however much they may be disconnected with it.

It is to be observed in the first place that this contention is opposed to the case made by the defendants in their written statement, for in paragraph 10 thereof they say: "whenever on account of the action of the river the *karari* lands on the banks are washed away and the *kachars* become changed to some extent; then the limit of *jalkar* Maksuspur of the defendants first party, also is shifted and it then has a new site extending to *kachars* and such is the condition of all the *jalkars* in the river Ganges."

In the second place franchise fishery in a certain section of a public navigable river between two banks fixed for ever and at the same time permanently subject to the payment of a fixed revenue is inconsistent with the nature of a right of fishery in a flowing river, for it is implied in this contention that if the river abandons its bed and assumes an entirely new course, the right of fishery is gone though the liability to pay the revenue, which *ex hypothesi* is permanent continues and does so for ever. It has not been contended that the defendants have a right of fishery within certain fixed banks and also a right of fishery in a fluctuating channel. Nor does this seem to me reasonable. In the Court below there was much contest between the parties as to the position of the so-called permanent high banks. The defendants pointed out to the Commissioner who held a local investigation into this case, certain high lands stretching along the south of the disputed *jalkars* though not forming a continuous line, as the old permanent banks of the river Ganges. The plaintiff denied this and asserted that the river never flowed along the north of these high lands. The commissioner in his report to which no objection was taken by either side states that the defendants could adduce no evidence before him that these high lands ever formed the southern bank of the Ganges, and that in his opinion, if the river had flowed along the foot of these high lands at any time, it must have been more than a century ago.

Indeed, it is quite apparent from the revenue survey map of the year 1847-48 that about sixty years back the whole tract between the high lands now pointed out by the defendants as an ancient bank, and the present south bank of the river was outside

CIVIL.

1918.

Ahmad Begum

Tarak Nath

Deputy J.

CIVIL.

1918.

Ahmadi Begum

Tarak Nath

Doss, J.

the then flowing channel and that even at that time it was dotted with hamlets and cultivated fields though intersected in some places by narrow streams and inlets of the river. The evidence of defendant's witness No. 9, who is aged 70 years and that of his witness No. 14 who is aged 66 years, go to show that during their time the position of the river has remained unchanged. This last witness who is an Amin of the defendant No. 1 says that he never saw the Ganges flowing by the side of the southern high bank pointed out by him to the commissioner, but that he ascertained the high bank from the tenants whose names however he could not tell. It is evident therefore that during the last 60 years the channel of the river Ganges never flowed over this intervening tract which is more than five miles in breadth. The existence of cultivated fields and hamlets close to the southern bank of the river as it then existed and of a sandy tract on the northern side of the channel points to the inference that the channel of the river, if it was then moving at all, was moving from north to south and not from south to north, as according to the theory of the defendants in regard to the position of high banks, it would. Besides, it appears from the letter of the Collector of Bhagalpur dated the 9th September, 1799, that at or before the time of the Permanent Settlement the river Ganges flowed along the southern border of Mouza Maksuspur and from the answers of the canongoes it appears that the Mouzas Bisunpur Saktea and Taluka Islampur were also on the northern bank of the Ganges as it then flowed, which Mouzas were then for the first time included in *silla* Tirhoot, the then flowing channel of the river forming the boundary between the *sillas* Tirhoot and Bhagalpur. Taking these facts along with the further fact that the tract between the river Ganges and the lakes in dispute comprises Srimantapur and portions of other Mouzas forming parcels of estates existing at the time of the Permanent Settlement, a presumption arises that about the time of the permanent settlement the section of the river Ganges opposite this tract of land flowed in nearly the same channel as it did at the time of the revenue survey in 1847-48. I do not think that any weight can be attached to the opinion of the commissioner as to the position of the so-called high bank, because it is based merely on the fact that the lands on the south of the lakes are higher in level than those on the north and that during the annual floods water reaches up to the foot of these lands. Besides the commissioner admitted in his

cross-examination that he could not say whether the high lands called by him high bank was the bank of the river Ganges as it existed before. I am of opinion therefore that the defendants have failed to prove that the discontinuous line of high lands shown by them as the southern bank of the river Ganges in former times was in fact such.

Great stress has been laid by the respondents upon the judgment of the principal Sadar Amin in suit No. 59 of 1861, and those of the District Judge and of this Court in appeal dated respectively the 26th February, 1866, 24th April, 1867, and the 11th June, 1868, in which the ancestor of the defendant No. 1 sued Rani Radha Chowdhurani the then owner of Mouza Amapur for possession and obtained a decree for possession of a certain *jalkar* as appertaining to *jalkar* Maksuspur. It was urged that these judgments were admissible as evidence of possession not only of the *jalkar* then in dispute but also of all *jalkars* lying on either bank of the river Ganges and situated in the estates of private proprietors abutting on the section of the river between Mayagunge and Pir Painthi, though there may be no connection throughout the year between them and the main channel, and it was further contended that as evidence of such possession these judgments were also evidence of title.

It appears that the lake in which a right of fishery was claimed in that case was situated in a *dearak* or island which had formed in the bed of the river Ganges surrounded on all sides by the flowing channel. There could indeed be very little doubt, under those circumstances, that the right of fishery in such lake would be part and parcel of the franchise fishery in the main channel. There is no similarity between the nature of the lake in that case and that in the present suit. In *Lord Advocate v. Lord Elantyre* (1), in which a title to the foreshore of a tidal navigable river as against the crown was rested *inter alia* upon the acts of possession enjoyed from time immemorial coupled with the barony title. Lord Blackburn in delivering his opinion to the House of Lords thus observed: "and all that tends to prove possession as owners of parts of the tract, tends to prove ownership of the whole tract, provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed as owners one part they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it, and what the kind of possession

CIVIL

1918.

Ahmad Begum

Tarak Nath,

Dutt, J.

8774.

1913.

Ahmad Begum

v.
Tarak Nath.

Dum. J.

was." In this passage the proviso is most important, and it serves clearly to differentiate that case from the present. In *Neill v. Duke of Devonshire* (1), which was an action by the Duke as owner of an exclusive fishery in a tidal navigable river under an ancient grant from the Crown for trespass against certain members of the public, the defendants justified their right to fish, on the ground that the public had the right of fishing. Certain judgments in possessory suits obtained by the Duke against strangers were held admissible as evidence of possession and user. This case only goes to show that the bed of a tidal navigable river is vested in the Crown, and the only question was raised whether the Crown had granted to the Duke an exclusive fishery in it. This does not touch the present case where the question does not relate to the right of fishery in the river, but the right to fish in lakes situated in the estates of private proprietors. The case which perhaps at first sight presents a closer analogy to the present is that of *Stanley v. White* (2). There the question was whether the right to the trees growing on a certain woody belt which surrounded the plaintiff's land, but which was undivided by any fences from the several closes adjoining, of which it formed part, belonged to the plaintiff or to the owners of the closes. The right of the plaintiff was held to be proved by evidence showing that from time to time he and his ancestors at their pleasure cut down for their own use the trees growing within the belt and that the several owners of the different closes enclosing the belt never felled trees there. The judgment of the Court was based upon the ground that probably the land of the whole belt belonged originally to the same person and that when he granted it out to others, he reserved the right to the trees then growing or thereafter to grow in the same soil. In the present case, however, there is no room for any such presumption at all. It is common ground in this case that the plaintiffs' estate Tappa Madhuban has always been a distinct, and separate estate from the time of the Permanent Settlement. A comparison of Exhibit R, extract from register of revenue-paying estates dated 1794-1795 with Exhibit 48 *purwana* for delivery of possession dated 19th April, 1813, shows that none of the Mouzas included in estate Tappah Madhuban ever formed part of Rai Kripanath's estate in Purgana Kahalgaoon. It is clear therefore that the reason upon which the judgment in *Stanley v. White* (2), proceeded is wholly inapplicable to the present case.

(1) (1882) L. R. 8 A. C. 135.

(2) (1811) 14 East 382.

The respondent has also strongly relied upon the evidence adduced by the defendants showing that the proprietors of several other riparian estates have acquiesced in the defendants exercising their right to fishery in lakes situated within the ambit of their respective estates. In the first place, it is not clear upon the evidence whether communication between those lakes and the river continues to exist throughout the year; and, *secondly*, such acquiescence by some proprietors would be no evidence against others, far less against inland proprietors, in the position of the plaintiffs unless as the case of *Stanley v. White* (1) shows, there is room for the presumption that all the riparian estates, the proprietors whereof have acquiesced in the exercise of their right, formed originally integral parts of the estate of a single proprietor.

I am unable to agree with the finding of the learned Subordinate Judge that the present suit is barred by limitation. The plaintiffs, second party, who are the lessees of Tappah Madhuban since about 1864, have produced their account books from 1280 to 1308 B. S., containing accounts of the sub-lessees of the fisheries in Tappah Madhuban. The accounts of the years 1280 and 1281 show that Parag Mahaldar was a sub-lessee of the *jalkar mehal* and paid an annual *jama* of Rs. 458 for those years. The account books of 1282 show that Gokul Mahaldar paid a *jama* of Rs. 474 for that year to the lessees for *jalkar* Singhia, Bhorung and others. On the 28th Bhadra 1283, i.e., 13th September 1875 Gokul Garhi (another name for Gokul Mahaldar) obtained from Messrs. Gisborne and Company, the lessees of Tappah Madhuban (upon executing in their favour a registered *kabuliat*) a sub-lease of the fisheries in mouzas Mohanpur, Mullikpur, Harinkole, Imamnagar, Kakarghat, Khizerpur and Amtapali for a period of 3 years from 1283 to 1285 at an annual *jama* of Rs. 501. It may be noted in passing that though other *jalkars* of mouza Mullikpur were included in this sub-lease, *jalkar* Singhia of that mouza was not included therein and hence *jalkar* Singhia mentioned in their accounts, till the year when the next *kabuliat* by Gokul was executed, must refer to *jalkar* Singhia in Harinkole. The account books from 1283 to 1285 show that he paid an annual *jama* of Rs. 501 for those 3 years. Those for the years 1286 to 1287 show that he paid an annual *jama* of Rs. 401. The account books for 1290 and 1291 show that Kali and Hira Mahaldar paid an annual *jama* of Rs. 461 for

CIVIL

1918.

Ahmadi Begum

Tarak Nath.

Doss, J.

CIVIL

1918.

Ahmadi Begum

v.
Tarak Nath.

Dass, J.

those years. The account-books for 1292, 1293 and 1294 show that they paid an annual *jama* of Rs. 401 during these 3 years. The account-books for 1295 show that Karimullah and Gokul Mahaldar paid a *jama* of Rs. 461. On the 5th August 1889 Gokul Mahaldar obtained from the proprietors of a 14 annas share of Tappah Madhuban (upon executing in their favour a registered *kabuliat*) a lease of a 14 annas share of the *jalkar mahal* in mouzas Mullikpur, Kakarghat, Harinkole, Imamnagar, Amtapoli, Surmazpur, Mayapur, etc., at an annual *jama* of Rs. 530 for a period of 7 years from 1297 to 1303. The account-book for the year 1297 of plaintiffs second party who were then lessees of 2 annas share only of Tappah Madhuban shows that Gokul Mahaldar paid a *jama* of Rs. 68 including road-cess and other charges in respect of the 2 annas share. In 1298, the plaintiffs, second party, obtained from the proprietors of the 14 annas share of Tappah Madhuban a lease of their share for a term of 7 years from 1298 to 1305. From that year Gokul paid the entire 16 annas of the *jama* of the *jalkar mahal* to the plaintiffs, second party. The account-book for 1299 shows that though the annual *jama* was Rs. 530 which with road-cess and other charges amounted to Rs. 548, Gokul was able to pay Rs. 100 only leaving a balance of Rs. 448. In the subsequent years his payments always fell short of the annual *jama*.

The learned Subordinate Judge has not disbelieved these account-books but he has put them aside holding that they do not relate to the *jalkars* in suit but to other *jalkars* in other mouzas in Tappah Madhuban. The *kabuliat* dated 13th September 1875 distinctly mentions the *jalkars* in mouzas Mallickpur, Harinkole, Imamnagar, Kakarghat and Khizerpur and the *jalkars* in suit are included amongst them. Though in some of these accounts *jalkars* are mentioned as *jalkar* Singhia, etc., or as *jalkar* in Mullikpur it is quite clear that in the heading of the account this compendious form was used in order to denote all the *jalkars* specified in the schedule of that *kabuliat*, and Mullikpur was mentioned in the heading as being the mouza, the *jalkars* whereof were specified first in that document. The learned Subordinate Judge considered that the *kabuliat* of 1282 was not a *bona fide* lease in the sense that it included some *jalkars* of which the lessors had no possession at all and he did so on the ground that the *kabuliat* was for a term of two years at a *jama* of Rs. 501 per annum and yet after the expiry of that term the rental was reduced to Rs. 401 although the *jalkars* were

leased to the same fisherman. Upon these grounds he thought that this *kabuliat* was an attempt on the part of the plaintiff to take possession of the *jalkars* through their fisherman, but as the latter failed to get possession, the rental was reduced by about Rs. 100. As I have already said the account-books for the years 1280 and 1281 show that Poran paid Rs. 450 for each of those years and that in 1282, *i.e.*, in the year preceding the year in which Gokul executed the *kabuliat* his *jama* was Rs. 474 or rather 481 including extra charges; and that though in 1286, 1287, 1288 and 1289 he paid an annual *jama* of Rs. 401, in 1290 and 1291 he paid an annual *jama* of Rs. 461. If reduction of rent may raise the inference that the lessee was not put in possession of all the *jalkars* mentioned in the lease, then the payment of Rs. 474 in the year preceding that in which the *kabuliat* was executed ought to raise a counter-inference that he had already been in possession of nearly all these *jalkars*. I am of opinion that the learned Subordinate Judge has proceeded upon erroneous grounds and his finding that the *kabuliat* is not *bona fide* cannot be sustained. Nor can I assent to the view taken by him that the *kabuliat* dated the 5th August 1889 was probably only a preliminary step to the plaintiffs' attempt to dispute the defendants' rights to the *jalkars* in suit. If the *kabuliat* of 1875 is *bona fide*, the *kabuliat* of 1889 must necessarily be so too, as it reserved nearly the same rent as the *kabuliat* of 1875 did and included almost the same *jalkars* as those which had been included in the previous *kabuliats* with a slight addition thereto.

On the 7th October Gokul Garhi complained to the criminal Court that the lessee of *jalkar* Maksuspur had obstructed him in catching fish in *jalkar* Singhia. He was referred to the civil Court for redress. In February 1892 he himself put a *bari* or palisading across *jalkar khana* and created a disturbance followed by a riot for which he was imprisoned. Both the Deputy Magistrate and the Sessions Judge held that since that date possession of *jalkar khana* was in dispute between the parties, and that neither party was in peaceful possession. If the plaintiffs first party are the rightful owners of the *jalkars* in suit, as I have held, they are, then the events which happened in 1892, regard being had to these findings of the criminal Courts, would not in law, have the effect of ousting them from *jalkar khana*, far less from the other *jalkars* in suit.

That the dispossession began not earlier than 1892 is further corroborated by the circumstance that while the income from

OLYIL.

1918.

Ahmadi Begum

c.
Tarak Nath.

Doost, J.

CIVIL,
1918.
Ahmadi Begum
v.
Tarak Nath.
Doss, J.

jalkar Maksuspur as appears from the accounts filed by them, gradually rose from Rs. 1,336 in 1865 to Rs. 1,550 in 1893 with the exception of an intervening period from 1872 to 1878 during which the income was Rs. 1,700 after the execution of the *kabuliat* dated 5th February 1891 (which however was to take effect from 1894) the income suddenly rose from Rs. 1,550 to Rs. 1,912 as appears from defendants' *kabuliat* Exhibit 1, dated 5th February 1891 and Exhibit 1₁₁ dated 1st February 1894 and this income further rose in 1896 to Rs. 2,302 as appears from Exhibit 1₁ dated 10th November 1893 and Exhibit 1₃ dated 18th September 1898.

I am of opinion that the plaintiffs were in undisturbed possession of all the *jalkars* in suit up to 1299 Fasli or in other words up to October 1891 when the fishing season for that year commenced and the dispute between the parties first began. On the 7th October 1891 Gokul Garhi complained to the criminal Court that the lessee of *jalkar* Maksuspur had obstructed him in catching fish in *jalkar* Singhia. He was referred to the civil Court for redress. In February 1892 he himself placed a *barr* or palisading across *jalkar khana* and created a disturbance resulting in a riot for which he was imprisoned. Both the Deputy Magistrate and the Sessions Judge held that since that date possession of *jalkar khana* was in dispute between the parties and that neither party was in peaceful possession.

If the plaintiffs, first party, are the rightful owners of the *jalkars* in suit as I have held they are, then the disturbances which took place in 1891 and 1892 could not, in view of the findings arrived at by the criminal Courts, have in law the effect of ousting them from their possession of *jalkar khana*, far less from their possession of the other *jalkars* in suit of which as rightful owners thereof, they must, in the absence of exclusive and hostile possession by a stranger, be deemed to have been in legal possession. "If there are two persons in a field" observed Maule, J. in *Jones v. Chapman* (1), "each asserting that the field is his, and each doing some act in the assertion of the right of possession and if the question is, which of those two is in actual possession, I answer the person who has the title is in actual possession, and the other person is a trespasser." See the opinion of Lord Selborne in *Lowe v. Telford* (2) in which the above *dictum* is cited with approval. Furthermore there is another circumstance which goes to show that the dispossession by the defendants did not commence earlier than 1292 F. S.

(1) (1847) 2 Ex. 808; 76 R. R. 794. (2) (1876) L. R. 1 A. C. 414.

It appears from a comparison of the account-books filed by the plaintiffs, second party, with the *kabuliats* filed by the defendants that the receipts from Gokul fell from about the same time the annual *jama* of *jalkar* Maksuspur began to rise. A comparison of the *kabuliat*, Exhibit 15 dated the 5th February, 1891, with the *kabuliat*, Exhibit 111 dated the 1st February, 1894, shows that the annual *jama* of *jalkar* Maksuspur suddenly rose from Rs. 1, 550 to Rs. 1,912, though the increase in the previous years was gradual and was due probably to the increased price of fish. This can only be accounted for by the fact that the defendant, first party, had at that period succeeded in taking possession of other *jalkars* and it has not been suggested that the defendants had at this period taken possession of the *jalkars* of any other proprietor.

The *kabuliats* produced by the defendants relate to *jalkar* Maksuspur and do not in express terms include any of the *jalkars* in suit. I am inclined to attach more credence to the evidence of plaintiffs' witnesses than to that of the defendants' as their statements are borne out by the documentary evidence adduced on their behalf.

As regards the proceedings of the year 1853 under Act IV of 184c in which the predecessors of the plaintiffs first party were held to be in possession, I am disposed to agree with the learned Subordinate Judge, though not for the same reasons that they relate to *jalkar* Singhia in Mouza Mullikpur and not to *jalkar* Singhia in Mouza Harinkole. In the petition of Har Lal Gouri (the lessee of the defendant, first party), filed on the 21st November, 1853, the subject of dispute was stated to be *jalkar* Singhia in *jalkar* Maksuspur while in the petition of Syed Abed Ali the predecessor in interest of the plaintiff first party filed on the same date asking for summons on his witnesses, the subject of dispute was described as *jalkar* Singhia Bhorung in Taluka Madhuban. Mahasay Dwarka Nath Ghose, the predecessor in interest of defendant No. 1, and Khosali Ram in the petition of intervention which they filed in the same proceedings on the 6th of December, 1853, referred to the fact that Syed Abed Ali, zemindar of Tappah Madhuban, had on a former occasion, unsuccessfully claimed *jalkar* Singhia then in dispute as his own *jalkar* Rajghat, etc., etc. In answer thereto they urged, "but the said zeminder thinking that a portion of the bed of the river Ganges lies in Tappah Madhuban declares the said *jalkar* as belonging] to him, but this is a mistake on his part for your

CIVIL.

1913.

Ahmadi Begum

v.

Tarak Nath.

Doss, J.

CIVIL

1918

Ahmadi Begum

r.

Tarak Nath.

Doss, J.

petitioners have no concern with the lands." Exhibit C, the Survey map of the 9 mouzas shows that in 1847-48, that is 4 or 5 years before the institution of those proceedings, the river Ganges flowed through Mouza Mullikpur. It seems to me therefore probable that the *jalkar* in dispute in those proceedings was some *jalkar* in Mouza Mullikpur a portion whereof was then in the bed of the river. But whether the dispute related to a *jalkar* Singhia in Harinkole or to some *jalkar* in Mullikpur is immaterial for the dispute related to a *jalkar* situated in a Mouza which, like the other Mouzas Harinkole, Imafinagar, Khizerpur, etc., lies along the northern boundary of Tappah Madhuban. Relatively to *jalkar* Maksuspur, the *jalkar* then in dispute stood on the same footing as the other *jalkars* situated in the frontier Mouzas of Tappa Madhuban and was claimed as one out of a chain of *jalkars* like Rajghat, etc., *jalkar* Rajghat itself being in Mouza Kakarghat, one of the Mouzas on the northern boundary. The proceedings of 1853 are therefore, in my opinion, relevant evidence of possession in that year by the predecessor in interest of the 1st party, of one out of a group of *jalkars* situated on the northern frontier of Tappah Madhuban and was cognate in character to the *jalkars* in suit.

Besides the reasons mentioned above, there is a further ground which I think, saves the suit from being barred by limitation. It appears that from 1298 to 1305 F. S., (29th September 1890 to 31st August, 1898), Tappah Madhuban was in the possession of the plaintiffs second party as lessees under the plaintiff first party and the *jalkars* in dispute together with other *jalkars* were in the possession of Gokul from 1297 to 1303 F. S., (10th September, 1889 to 21st September, 1896) as sub-lessee under the plaintiffs second party. It is clear, therefore, that the dispossession even if it be deemed to have taken place in October, 1891, took place during the currency of the lease and the sub-lease; the plaintiffs would consequently have no right to bring a suit against the defendants for recovery of possession of the *jalkars* until the lease and the sub-lease expired: see *Narain Roy v. Opnit Misser* (1), *Sheo Sohya Roy v. Luchmeswar Singh* (2), *Bissesuri Dabee v. Baroda Kanta Roy Chowdhury* (3), *Sharat Sundari Dabia v. Bhobo Prosad Khan Chowdhury* (4), *Rishwar Nath Sahi Deo v. Kali*

(1) (1882) I. L. R. 9 Calo. 801.

(3) (1884) I. L. R. 10 Calo. 1076.

(2) (1881) I. L. R. 10 Calo. 577.

(4) (1886) I. L. R. 18 Calo. 101.

Santar Sahni (1) and *Thammun Pande v. The Maharaja of Vizianagram* (2).

The fact that after the expiry of the leases in favour of the second party, in 1305 F. S., the plaintiff, first party granted them fresh leases would not preclude them from bringing an action for recovery of possession, nor would it stop the period of limitation from running. In *Ecclesiastical Commissioners of England and Wales v. Rowe* (3), where during the currency of a lease, renewed by the Dean of Saint Asaph in favour of Hugh Jones Sarah Moulton, the predecessor in title of the respondent in that case, entered into possession of a portion of the lease-hold property without any valid title, the House of Lords held that the right of action to recover the premises did not accrue to the Dean until the surrender of that lease, and that a renewal of the lease even if made contemporaneously with the surrender, would not prevent time running in favour of the trespassers. Lord Selborne L. C., thus expounded the reasons for their rule: "If so her" *i. e.*, Sarah Moulton's, "possession commenced during the currency of the lease granted by the Dean to Hugh Jones on the 2nd May 1820 which lease continued to subsist until the 18th June, 1828, when it was surrendered contemporaneously with and in consideration of the grant of the new lease of that date. On that surrender a right of action to recover the premises of which Sarah Moulton was then in possession accrued to the Dean, and all the new lease-hold interests, then, and on each subsequent renewal created, were, in my opinion, derived from and out of the estate in possession which then became vested in the Dean. That surrender although not effected by a separate instrument, must in my opinion, be deemed to have preceded the new grant; and I cannot assent to the argument addressed to Your Lordships by the appellant's Counsel, that the effect of a renewal contemporaneous with a surrender, is, to prevent the accrual of a right of action to the lessor by the surrender of the former lease against a disseisor or trespasser, an argument which seems to be inconsistent with the provisions as to reversionary estates contained in the 3rd and 5th sections of the Statute of Limitation, and which, if well-founded would prevent that statute from ever running in favour of any length of possession whatever against a title to church lease-holds renewed from time to time in the manner, which was formerly customary, and of which an example is to be found in this case."

CIVIL.

1918

Ahmadi Begum

Tarak Nath.

Doss, J.

(1) (1905) 10 O. W. N. 843

(2) (1907) I. L. R. 29 All. 598

(3) 1880) L. B. 5 A. O. 736

CIVIL.

1918.

Ahmadī Begum

v.

Tarak Nath.

Doss, J.

I hold therefore that plaintiffs' suit is not barred by limitation.

For the foregoing reasons I am of opinion that the plaintiffs' suit and this appeal ought to be decreed with costs.

As my learned brother, however concurs in the judgment of the Court below, the decree of the Court below is affirmed and this appeal is dismissed with costs.

Richardson J.—I have the misfortune to differ from my learned brother. I do so with the greatest diffidence and the greatest reluctance, but I am bound to state the opinion I have formed on the best consideration which I have been able to give to the case.

The dispute relates to the right of fishing in certain waters and the respective claims of the parties have already been stated. The question is whether this right of fishery appertains to the zemindari estate of which the plaintiffs, first party are proprietors (so far as the waters are included within the boundaries of their estate), or whether it appertains to the fishery of the defendants which is also a permanently settled estate bearing a separate number on the revenue roll of the Bhagalpur Collectorate. For the sake of brevity, I shall refer to the plaintiffs, first party, and the defendants Nos. 1 and 2 as the plaintiffs and the defendants respectively. The other plaintiffs and the defendants are for most purposes in the same box with the principal parties.

The history of the fishery is of some interest. At the time of the Permanent Settlement it was in the possession of the principal proprietors in Purgana Kolgunj who subsequently fell into arrears with their revenue. The rights of which they were in possession including the fishery (which latter may have extended over land belonging to them as proprietors or may have been an adjunct to their proprietary estate, extending over lands not included in that estate) appear to have been sold in lots and the fishery thus became a separate estate with a separate number on the revenue roll (*vide* Hunter's Statistical Account of Bengal, Volume XIV, page 137). As such it has been in existence ever since under the name of *jalkar* Maksuspur. Some further account of purgana Kolgunj and its early proprietors will be found at pages 244-246 in the same Volume of the Statistical Account. I may add that I refer to this Volume principally for the purpose of giving a historical and local setting to the case and that such a use of the book would appear

to be permissible under the penultimate paragraph of section 157 of the Indian Evidence Act (see also *Garuradhwaja's case* (1)).

Now in the case of such a fishery with such a history separately entered in the revenue-roll, speaking for myself, I should not be surprised to find that it has some peculiar characteristic not usually found in fisheries in navigable rivers. This is precisely what the defendants claim. They say that the fishery is *sui generis* and that their rights extend not only, as in the ordinary case, to the main stream of the Ganges and to channels connected throughout the year with the main stream but to all waters, whether flowing or stagnant, within certain physical limits. The river Ganges in this part of its course flows from west to east and the limits of the fishery on the west and the east are two points on or near the river, said to be distant 40 or 44 miles from each other—whatever the distance there is no dispute as to these points—the defendants claim that the northern and southern limits are the permanent high banks of the river. About this, controversy has arisen mainly in the present case with reference to the state of things on the southern side of this riverain tract.

An attempt has been made by the plaintiffs to deny the existence of a permanent high bank to the south of the main channel of the river. But the evidence appears to me to show that there is a high bank on the south and that it has maintained much the same position as it had at the time of the Permanent Settlement. The line of this bank is indicated in the plaintiffs' own map (Exhibit A1) which was filed in Court in 1903 in connection with their first suit from which they subsequently withdrew. Mention is made of the bank in a notification of Government dated the 28th September 1904 in the *Calcutta Gazette* of the 5th October 1904. There is evidence on the subject in the report of commissioner, Babu Surendra Nath Bose, dated the 30th May 1904 and in the report of commissioner Babu Akshoya Kumar Chatterji, dated the 11th September 1905 (*vide* paragraphs 31 and 32 of the report). Reference may also be made to paragraph 23 of the Volume of Hunter's Statistical Account of Bengal to which I have already referred. The description there given tallies remarkably with what is said in the reports of the commissioners. Taken as a whole, the oral evidence appears to me to support the case of the defendants.

ORVIL.

1918.

Ahmadi Begum

v.
Tarak Nath.

Richardson, J.

CIVIL.

1918.

Ahmadi Begum

*
Tarak Nath.

Richardson, J.

It would take long to examine it in detail, and I content myself with stating the strong impression left on my mind.

Agreeing with the Subordinate Judge, I find that there is a high bank to the south of the waters to which the dispute relates and that this is the permanent high bank of the Ganges. It is quite clear to my mind that annually in the rainy season the whole country between the high bank and the main stream of the Ganges except such lands as may exist under water and that this condition of things is not merely as the plaintiffs would have us believe or peculiarly of the year 1904 when a commissioner happened to visit the spot for the purpose of making a local enquiry. In fact, as the Subordinate Judge observes in the rainy season the main stream of the Ganges and the water covering the lands up to the southern high bank from one sheet of water and during that season at any rate those lands are a part of the bed of the river. If so, there seems to me no reason why they should not be considered a part of the bed of the river during the dry season. There is no counterpart in England to the vast plains and rivers of Bengal and the conditions under which land and rights over land are held differ in many respects. But the case of *Hindson v. Ashby* (1) was cited at the Bar and may be usefully referred to in this connection. I see no difficulty in the distance of the main stream from the south bank. A fishery over a tract of country from 40-44 miles long may be expected to be some miles wide, and there appears to me to be every reason to suppose that though the main stream of the Ganges may have oscillated between its two banks, the condition of things now is much the same as it was at the time of the permanent settlement and no reason to suppose the contrary.

The conclusion at which, I have just arrived clears the ground. It follows, regard being had to the maps and the evidence, that the waters to which the dispute relates are within the physical limits of the defendants' fishery. If this is so, then in my opinion claims which have been made in respect of, and acts of ownership which have been exercised in, other waters within the same limits—I confine myself more particularly to the southern side of the tract over which the fishery extends,—those claims and those acts are admissible in evidence for what they may respectively be worth in the present suit. (Indian Evidence Act sections 11 and 13; Taylor on Evidence, 10th

(1) (1896) 2 Ob. 1.

Edition, Volume I, paragraphs 320-325, pages 252-256); *Hori Das Mal v. Mahomed Faki* (1), *Nam Vinayak v. Narhari* (2).

I come then to the case put forward for the defendants and I shall refer first to the earlier documents which throw light on the nature of the fishery known as *jalkar* Maksuspur, and then advert to the disputes in regard to it which took place during the course of the last century. As to the relevancy of these earlier documents there is no contention.

The fishery is mentioned in Exhibit S, a document of 1198 Fusli (1791 A. D.) otherwise of little importance. It is apparently mentioned also in the list of *jalkars* attached to a letter dated 5th September 1791 from Mr. Collector Grant to the President of the Board of Revenue. This would seem to show that the fishery owned by Kripa Nath or Kripanand, the principal proprietor in purgana Kolgunj, was much more valuable than any other fishery in those parts. But I do not lay much stress on this document, nor on Exhibit R, an extract from the register of revenue-paying estates for the year 1794-95, which again mentions *jalkar* Maksuspur as a component part of Kripa Nath's estates. Undoubtedly the most important document and the one which tells most in favour of the defendants is the letter dated the 5th September 1899 from the Collector of Bhagalpur to the Board of Revenue (Exhibit 2). The letter appears to have been written in consequence of some quarrel between the Collectors of Bhagalpur and Tirhoot as to the treasury into which the revenue of *jalkar* Maksuspur should be paid and refers to the creation of the fishery as a separate estate. The fishery is described in the Collector's letter as "comprehending the entire stream between both banks of the Ganges." It is said to have been sold alone "unaccompanied by any, even a foot of land, with all the privileges and profits previously enjoyed therefrom by Kripanand." Appended to the letter are the answers given to certain questions by two *kanungoes*, one of whom is styled the hereditary head *kanungo* of purgana Kolgunj. The *kanungoes* state that "Bhowani Prosad purchased the entire fishery from bank to bank" and that "the fishery is bounded.....to the northward and southward by the banks of the river, including not only the whole course of the river but all water flowing or stagnant on both banks....." They further state that no fisherman whatever has a right to fish within the boundaries without a *potta* or license and the exclusive right of granting such *potta*

CIVIL.

1918.

Ahmadi Begum

v.
Tarak Nath.

Richardson, J.

ORVIL

1918

Ahmadi Begum

v.

Tarak Nath.

Richardson, J.

within the specified boundaries whether on this or the opposite side of the river is vested in Bhowani Prosad. To my mind there is no means of avoiding the directness and the precision of these statements. The words used both by the Collector and the *kanungoes* must be supposed to refer to rights which were then in existence, but even if this were not so, occurring as they did in a letter issued from the Collectorate, their force would probably be sufficient to give rise to colourable acts of possession which would ripen in course of time into rights of possession. It will be observed that in the description of the *jalkar*, there is no reservation made in respect of any of the proprietary lands within the limits given. Whether all these lands were previously in the possession of Kripanand may be doubted, but there is no difficulty, I think, in supposing that the fishery did not extend merely over lands previously held by Kripanath but over all lands within the specified limits.

The letter of 9th September 1799 was followed by the *parwana* of 16th November 1799 by which Bhowani Prosad was informed of an order of the Board of Revenue directing that possession of the fishery be delivered to him and was required to pay the revenue into the Bhagalpur Collectorate.

Exhibit 48 dated the 29th April 1813 is a *parwana* recording the sale of Tappah Madhuban of which the plaintiffs are now the proprietors and in which the waters to which the dispute relates are now situated. The property was sold "with *jalkar*, *bankar*, *phalkar*, etc., and all rights appertaining thereto." The sale could not of course have affected rights appertaining to *jalkar* Maksuspur. There is a list of mouzas attached to the *parwana*, but no mention is made of any particular *jalkar*. Tappah Madhuban comprises lands which are not between the permanent high banks of the Ganges.

I leave the earlier documents and go on to subsequent events. In 1853 a dispute arose which led to proceedings under Act IV of 1840 in respect of a *jalkar* named *jalkar* Singhia. It has been much debated whether this *jalkar* is the *jalkar* Singhia in mouza Harinkole within the physical limits of *jalkar* Maksuspur or another *jalkar*, *jalkar* Singhia *baktadhar* in mouza Mullikpur outside those limits. It was claimed by the predecessors in interest of the defendants as a part of *jalkar* Maksuspur (Exhibit 60 and Exhibit 7). The terms of the orders passed by the criminal Courts (Exhibit BB and Exhibits 52 and CC) seem to make it clear that the predecessors of the defendants

were then claiming a *jalkar* to which they were not entitled as being outside the limits of *jalkar* Maksuspur. In the copy of the final order of the Sessions Court produced by the plaintiffs (Exhibit 52) the distinctive new word *bakea* which appears in the defendants' copy (Exhibit CC) is omitted. The omission may or may not have been accidental but the inclusion of the distinguishing word makes all the difference. The defendants did not follow up their claim in the civil Courts. The dispute of 1855 therefore has no bearing on the present case except that the criminal proceedings of 1891-92 to which I shall refer, probably owed their origin to the same cause, the existence of these two *jalkars* with similar names not far from each other, one outside and the other within the limits of the defendants' fishery, and the temptation thereby offered to both parties to make unfounded claims.

In 1860 another dispute seems to have arisen which was eventually decided by three judgments which are on the record. The judgment of the principal Sadar Amin Exhibit T2, is dated the 26th February 1866, that of the District Judge, Exhibit T3, is dated the 24th April 1867, and that of the High Court, the 11th June 1868. I cannot help thinking that the issue decided in those judgments was the very issue which has arisen in this case. No doubt the *jalkar* then in dispute was a *jalkar* situated in a *deara*, which the High Court describes as an island but it appears that in this part of the Gangetic system the whole bed of the river is included within the limits of permanently settled estate: see Exhibit C. The island was clearly an island forming part of such an estate, the *jalkar* upon it was not permanently connected with the main stream of the Ganges: and yet it was held mainly on the strength of the statements made by the Collector and the *canungoes* in 1799 that the *jalkar* was a part of *jalkar* Maksuspur. I confess that I cannot escape from the effect of this decision. On the top of this there is the evidence of the defendants' witness No. 11, Babu Aghore Nath Mukherji, *canungoe*, which is referred to by the Subordinate Judge. It is to the effect that a claim by the plaintiffs to fish in waters similar to the waters now in dispute and situated within a Government *khas mehal*, has been admitted by the Government. There is also other evidence of a similar kind in reference to other estates, which evidence the Subordinate Judge says that he sees no reason to disbelieve. The evidence refers to mouzas Sabaur, Mathurapur, Madhipur, Panna

CIVIL

1918.

Ahmadi Begum

Tarak Nath.

Richardson, J.

CIVIL.

1918.

Ahmadī Begum

Tarak Nath.

Richardson, J.

Chouk and Rejiuddinpur, Gopali Chak, mouzas in the Barari estate, mouzas Amapur and Ajodhyapur.

Nor is this all. The plaintiffs' own witnesses admit the possession by the defendants of the fisheries in waters similar to those in dispute which lie just outside Tappa Madhuban (*e.g.* *jalkars* Darhial, Digar and Deori and parts of other *jalkars*). The possession by the defendants of these *jalkars* is admitted "all along."

The dispute in 1891-1892 seems to have had reference first to *jalkar* Singhia (see the Exhibits B and D and map Exhibit A₁), and to have subsequently extended to the western portion of the waters in dispute. (See map Exhibit F). The judgment of the Sessions Judge (Exhibit X) may be referred to. The question of previous possession appears to have been decided in favour of the defendants, and I venture to think that the oral evidence in this case supports this view.

The long series of *kabuliats* and accounts produced by the parties seem to me to prove very little. They may show that there was some change and interchange of possession in reference to a part or parts of the waters in dispute, but I am unable to accept the conclusion that the plaintiffs' accounts and *kabuliats* go any great distance towards establishing their possession of the waters in dispute from 1875 to 1889. The description of the *jalkars* leased appears to me to be too vague to afford anything like a safe foundation for an inference of this kind. Names may have been included of *jalkar* of which no possession was taken and possession may have been taken of *jalkars* of which no mention was made.

The one fact which seems to me to stand out from this part of the evidence is that the plaintiffs have had no possession of any of the waters in dispute since the close of the criminal proceedings in 1892. Reference may also be made in this connection to paragraph 11 of the plaint filed by the plaintiffs in January 1903 and subsequently withdrawn.

Having dealt with the facts, I come to the legal question which has been raised. The long line of authorities upon which so much stress has been laid by the plaintiffs beginning with cases decided by the Sadar Dewani Adalat and such cases as *Grey v. Anand Mohan Mitra* (1), including such cases as *Tarini Churn Sinha v. Watson and Co.* (2), and ending with *Jogendra Narain Rai v. Crawford* (3) and *Ishan Chandra Das v. Upendra Nath Ghosh* (4), appear to deal merely with the ordinary

(1) (1864) W. B. 108.

(2) (1890) I. L. B. 17 Calo. 968.

(3) (1905) I. L. B. 32 Calo. 1141.

(4) (1908) 12 O. W. N. 559.

incidents in Bengal of a fishery in a navigable river. They do not affect the question raised in the present case except in so far as their effect is to place the original burden of proof on the defendants. I cannot accede to the contention that the right claimed by the defendants is an impossible right or one which the law will refuse to recognize. This very right is treated as a right which may be acquired by limitation or prescription in *Grey v. Anand Mohan Mitra* (1), (see penultimate paragraph of the judgment of Norman, J.) I may also refer to the observation of their Lordships of the Privy Council in *Forbes v. Meer Mahomed Hossein* (2). "That *jalkar* or the right of fishing may exist in India as an incorporeal hereditament and a right to be exercised on the land of another is shown by the case of *Lukhee Dasi v. Khatima Debi* (3)."

It is said that the defendants have produced no express grant of the right which they claimed. But they produce evidence dating from about the time of the Permanent Settlement and they prove long possession if not in respect of the waters in dispute at any rate in respect of other waters similarly situated. If the evidence is not entirely worthless and that is far from my opinion, the criticism referred to, can have little weight in reference to the defendants' title. Their title if it exists dates from the time of the Permanent Settlement, if not from a period long anterior and it is not, I think, difficult to suppose that the right to fish in these riverain lands was granted to them by some authority which had the power to make the grant even in defeasance of the ordinary rights of the proprietors with whom the lands themselves may have been at the time settled [compare *Rajrup Koer v. Abul Hossein* (4).]

In the view which I take of the case, the question of limitation in the form in which it is raised is of little importance. It would appear that there may be circumstances in which possession which is adverse to the lessee is also adverse to the lessor [see *Gobinda Nath Shaha Chowdhry v. Surja Kanta Lahiri* (5).] But I do not enter into the question at all and express no opinion upon it. I think it is sufficient to remark by way of comment that if, as I think, the plaintiffs had no possession over any part of the waters in dispute after 1892, they have been a very long time in bringing their claim before the civil Courts.

As to the written statement of the defendants, I have already

CIVIL.

1918.

Ahmad Begum

v.
Tarak Nath.

Richardson, J.

(1) (1864) 14, R. 108.

(2) (1873) 12 B. L. R. 210 (216). (4) (1890) 1, L. R. 6 Calo. 894 P. O.

(3) (1818) 2 Sel. Bop. 64.

(5) (1899) 1, L. R. 26 Calo. 460.

CIVIL.

1918.

Ahmadi Begum

v.

Tarak Nath.

Richardson, J.

indicated my view as to the substance of their claims. Their claims to follow the high banks of the Ganges, if and when they recede need not be discussed in this case, because it has not been shown that there has been any material alteration in the position of the southern high bank since the time of the Permanent Settlement. The distance of the main stream from that bank makes it improbable that there has been any appreciable erosion. Nor do I think that it is necessary now to consider the difficulties which may be caused in the event of the Ganges so changing its course as to flow outside the limits of the defendants' fishery. There seems to be no reason at present to apprehend the occurrence of so great a change, and I think that such difficulties may be left to be dealt with when they arise.

In the result, I agree with the conclusions arrived at by the learned Subordinate Judge and think that this appeal should be dismissed.

As the appeal was dismissed, the plaintiffs preferred this Letters Patent appeal.

Dr. Rash Behary Ghose, Babu Joges Chandra Roy, Moulvi Syed Mahomed Taher, Muhammed Mustafa Khan, Moulvi Khursed Hossein and Babu Hari Bhusan Mukerjee for the Appellants.

Mr. S. P. Sinha, Babus Umakali Mukerjee, Narendra Chandra Bose and Nares Chandra Sinha for the Respondents.

C. A. V.

The judgments of the Court were as follows :

March, 18.

Jenkins C. J.—The subject matter of this litigation is a *jalkar* or right of fishery in certain *bheels* named in the plaint as Khana Rajghat, Darbial, Dagar, Ghoremara, Barhia, Bhorung, Khirkiria, Chaprela, Parthenia and Singhia.

It is the plaintiffs' case that these *bheels* are situate in mouzas Kakarghat, Khizerpore, Imamnagar and Harinkole, all in Tappa Madhuban.

The plaintiffs 1 to 33 together own Tappah Madhuban, while plaintiff 36 is its *mustagir* or lessee.

On the strength of this proprietorship the plaintiffs claim to be exclusively entitled to the fishery rights in these *bheels* which are, so far as they are the subject matter of this suit, wholly within Tappa Madhuban.

The first three defendants claim to be entitled to this fishery as the grantees under the Government of *jalkar* Maksuspur. Defendant No. 4 is their lessee. They also claim to be entitled

on the strength of long enjoyment. The plaintiffs allege dis-
possession from the beginning of May 1892 to July 1894, and
by their plaint in this suit, they pray for judgment as follows :

"(1) That it may be held by the Court that *jalkars* Khana
Rajghat, Darbial, Dagar, Ghoremara, Barhia, Bhorung, Khirkiria,
Dhakli Burhia, Bhorung, Chaprela, Pardhanian and Singhia, to-
gether with branches and *dhas*, and all other *sotas*, Dobs
Khatas, Cheri, Bhata and Jamta being part of Tappa Madhuban,
are the *milkiat* of the plaintiffs; and that the plaintiffs and
former proprietors of Tappa Madhuban have for a long time,
that is, several 12 years,—been in possession as proprietors and
holding adverse possession of all the aforesaid *jalkars* together
with other *jalkars* situate within Tappa Madhuban, and within
halka of the aforesaid Tappa, by means of *khas tahsil* and
through *mustagirs* and *darmustagirs*.

(2) That it may be held by the Court that the defendants 1st
and 2nd party neither had nor have any right whatever to the
jalkars in dispute or any of them situate within Tappa Madhuban;
nor were they ever in possession of the *jalkars* in dispute or any of
these before the accrual of the cause of action in this suit, and that
they had and have no right in respect of any of the *jalkars* aforesaid.

(3) That a decree may be passed by the Court in favour of
the plaintiffs awarding them possession over the *jalkars* in dis-
pute aforesaid as proprietors and *mustagirs* thereof by dispos-
sessing the defendants 1st and 2nd party and permanent injunc-
tion may be issued against the defendants with these directions
that the defendants 1st and 2nd party or any of them should
not interfere with the right of fishing of the proprietors or the
mustagirs, the plaintiffs; and that they should abstain from fishing
in or exercising any power tantamounting to possession of the
jalkars in dispute, and that *wasilat* of the estate from the year
1308 to date of recovery of possession may be awarded to the
plaintiffs, and that amount of the same may be ascertained in
the execution of decree department."

The suit was heard by the Additional Subordinate Judge
at Bhagalpur who dismissed it with costs. The plaintiffs pre-
ferred an appeal to the High Court which was heard by Doss J.
and Richardson J. They were divided in opinion, Doss J.
being for reversing, and Richardson J. for affirming the decree
of the Subordinate Judge. The decree accordingly was con-
firmed, and the present appeal has been preferred under clause 15
of the Letters Patent.

CIVIL

1918.

Ahmad Begum

v.

Tarak Nath.

Jenkins, C. J.

CIVIL.

1918.

Ahmadi Begum

v.

Tarak Nath.

Jenkins, C. J.

It is common ground that the *bheels* in suit lie within the limits of Tappa Madhuban, and that the plaintiffs together are entitled to that Tappa; they claim to be equally entitled to all fishery rights over the *bheels* within its limits.

The defendants rest their claim on their ownership of the fishery known as *jalkar* Maksuspur in which they maintain, are included the *bheels* now in suit.

The original grant on which this ownership of the *jalkar* rests is not produced, but it is said, though not proved, to have been made as far back as the 17th century. As evidence of this grant reliance has been placed on certain documents and on long user. The earliest reference to this *jalkar* to be found on the record of this case is in a certified copy of *hakiat jalkar* of 1791 giving particulars of the *jama* of *jalkars* included in *mal* in *pergana* Kahalgau. There mention is made of "*jalkar* Maksuspur included in mouza Maksuspur" as held by Kripanath Choudhury.

It is similarly mentioned in Exhibit R, which is an extract from the Register of Revenue paying estates in *silla* Bhagalpur for 1794-95.

A more important reference is made to *jalkar* Maksuspur in a letter of the 9th September 1799, Exhibit 2, written by the Collector of Bhagalpur to the Board of Revenue at Fort William and in the replies of the head *canungoes* of *pergana* Colgong relative to the proprietary right and extent of *jalkar* Maksuspur. These replies were enclosed in the Collector's letter and two of them call for special notice. In reply to the question—"To whom is the proprietary right of *jalkar* Maksuspur vested agreeably to your records?" the following answer was given.

"When Roy Kirpanath fell in balance the whole of *jalkar* Maksuspur was included with other mouzas in a statement for sale and Bhawani Persad purchased the entire fishery extending from bank to bank at public auction, therefore agreeably to our *sherista* the right is vested in Bhawani Persad."

The next question was, "what are the boundaries of the fishery in question?" The answer was as follows:—"The fishery in question is bounded to the eastward by the westward extremity of Tappa Madhuban. To the westward by Mayagunge in *pergana* Bhagalpur and to the northward and southward by the banks of the river, including not only the whole course of the river but all water flowing or stagnant on both banks and consequently those of Bisanpore Sookteah and Talukah Ismailpore on the northern bank."

In the covering letter of the Collector, it is written as follows: "Roy Kripanath's estate in the pergana of Colgong extended to a considerable distance along both banks of the river Ganges and the *jama* of the whole of it was paid into the Bhagalpur Treasury until such time from the commencement of 1201 Fusli, corresponding with September 1793 as Government by determining that the river should in future be considered the boundary of both *xillas* occasioned the separation of the lands on the northern bank from *xilla* Bhagalpur, and the consequent annexation of their proportion of *jama* to *xilla* Tirhoot. In this estate was a *jalkar* and only one named Maksuspur and comprehending the entire stream between both banks of the Ganges and giving to the proprietor a right of preventing all fishermen who had not previously obtained from him a *potta* or license entitling them to fish, from exercising their trade in such part of the Ganges as was bounded by mouza Maksuspur on the one side and by the parallel bank on the other, but though this fishery derived its name from mouza Maksuspur, it formed a separate division or *mehal*."

In a subsequent passage the Collector wrote, "The second lot which consisted of *jalkar* Maksuspur alone, unaccompanied by any, even a foot of land, with all the privileges and profits enjoyed therefrom by Kripanath was brought by Bhawani Persad, and the sum he gave for the same was Rs. 960."

In 1860 *jalkar* Maksuspur became the subject of litigation, the question at issue being whether a *jalkar* situated in a deara which was described as an island formed in the bed of the running stream of the Ganges was included in *jalkar* Maksuspur. The judgments of the P. S. Amin, of the Officiating Judge of Bhagalpur, and the High Court are in evidence, and a perusal of them shows that they have considerable relevancy to the question now under discussion. There the plaintiff as owner of *jalkar* Maksuspur claimed that "she was entitled to the *jalkar* rights not only of the whole course of the river Ganges from Mayagunj to Colgong but to that of all waters flowing or stagnant on both banks and as the disputed *jalkars* were parts of the flowing stream during the rainy season so she lays claim to them." This contention was upheld in all three Courts, and in its essential features, it bears a close resemblance to the contention in this suit.

That there was a grant of *jalkar* Maksuspur is, I think, clearly established: the question is what passed to the grantees and what is now vested in the defendants who claim under them,

CIVIL.
1918.
Ahmadi Begum
v.
Taruk Nath.
Jenkins, C. J.

CIVIL.

1918.

Ahmadi Begum

v.

Tarak Nath.

Jenkins, C. J.

The grant certainly passed a right to fish in the river Ganges from Mayagunj eastwards : this indeed is not disputed. For the defendants it is contended that the *jalkar* extends eastwards as far as a place called Pirpainthi, a distance of 40 miles or so in all. For the plaintiffs it has been contended before us, though somewhat faintly that the fishery terminated at a point short of this. It would seem from the judgment of Richardson J. that no dispute was raised as to this eastern boundary by the plaintiffs when the appeal was before him and Doss J. But however that may be, I am satisfied that the defendants' contention is well founded, and that Pirpainthi is the eastern most limit of the fishery. In this part of the Ganges there are three distinct *jalkars* running from west to east. The first runs from Ruhooak nullah in Monghyr to Mayaganj in Bhagalpur, and is known as *jalkar* Gungaputtee, the second named *jalkar* Maksuspur runs from Mayagunj to Pirpainthi, and the third from Pirpainthi to Soonti (see Exhibit Z4 and K) This bears out the defendants' contention, which in my opinion is not negatived by the 4th answer in the *Canungo's* report of 1799 (Exhibit 2.)

The defendants' view has been accepted by all three Judges before whom the case has already come, and without further labouring the point I hold that *jalkar* Maksuspur runs eastward as far as Pirpainthi.

Treating the river as flowing from west to east the next problem is to ascertain its northern and southern boundaries. One would ordinarily say that these boundaries are its northern and southern banks, and, for what it may be worth, this is the indication furnished by the *Canungo's* report (Exhibit 2).

It would have been more satisfactory had there been evidence of the northern boundary's position, but there is none beyond such as would justify us in holding that it must somewhere to the north of the dry weather stream of the Ganges.

So far the case is fairly simple ; the real difficulty is as to whether the *jalkars* in suit lie between the two banks of the river or in other words, in the bed of the river. This is substantially a question of fact and it will be a help towards its solution to have a mental picture of the river as it flows eastwards from Bhagalpur to Pirpainthi.

It possibly is, because the Court, the pleaders and the witnesses, at Bhagalpur were dealing with matters and scenes familiar to them and illustrated probably by conditions within actual view of the Court house, that the evidence as recorded

may appear to be lacking in clearness, for much, doubtless, was taken for granted that is not obvious to those unacquainted with the locality. From Bhagulpur the main stream of the Ganges flows in a south-easterly direction towards Colgong where it is diverted northwards for a few miles. It then takes a bend towards the east and so reaches the neighbourhood of Pirpainty. This is very clearly shown by the maps in the case.

The *bheels* now in dispute lie to the south-west of Pirpainty and are in no sense a part of the present dry weather stream of the Ganges, but are at a distance of some miles from it. But when the annual rains are established this dry weather stream extends on its southern side as far as that which the defendants describe as the southern high bank of the Ganges thus covering the *bheels* in suit which lie to the north of the bank.

It is contended for the defendants that this bank is in truth the southern bank of the river Ganges, and that what lies to the north of it, including the *bheels*, is a part of the river-bed. As supporting the view that this is the southern high bank of the river the defendants point to its position and configuration, to its height in relation to the wide level stretch of low lying land to its north, to the contrast between the soil and growth on it and on the land to the north, and to the apparent marks of towing cords to which the Commissioner report refers. Insisting then that this still is the permanent south bank of the Ganges, the defendants maintain that these *bheels* lie in the bed of the river and so are included in their *jalkar* grant.

The plaintiffs hotly contest this : they argue that this wide tract of land cannot be regarded as the bed of the river Ganges and this argument they seek to support by the fact that its width is 10 miles or more, that there are inhabited villages on it, that when the waters recede the soil is cultivated and bears crops, and that the land has actually been settled by the Government.

These no doubt, are matters to be taken into consideration and duly weighed but their proper significance cannot be realized unless the character of the river in this part of its course kept in mind.

The change from a stream, a mile or so in width to an expanse of water 10 miles across is remarkable, but it is nothing unusual in this part of the river Ganges : it is of regular annual occurrence. Nor is the increase in volume so transient as to be negligible for the purpose of considering whether the flood

CIVIL.

1918.

Ahmadi Begum

Tarak Nath.

Jenkins, C. J.

CIVIL

1918.

Ahmadi Begum

v.

Tarak Nath.

Jenkins, C. J.

stream is a part of the river: it lasts each year for a couple of months and notwithstanding its expanse there is a current in it from west to east, though naturally not a strong one.

This increased volume of water, extending as far as southern high bank, is not an inundation, it is the normal flood stream of the Ganges and an integral part of the river. Much has been made of the presence of villages on this tract of land but this does not show that it is not the bed of the river. The character of the structures which go to make up the village must be borne in mind. And that there is nothing impossible involved in the idea of a village in the bed of the river is shown by the fact that at Bhagulpur within sight, we are told, of the Court House, the village of Shankarpore stands in the bed of the Ganges. (See witness No. 4 for the plaintiff) nor can I regard the cultivation of winter crops as in any way conclusive against the defendants. Here too regard must be had to all the circumstances. The silt brought down by the Ganges and deposited on this area in the rains forms a soil of high fertility and the opportunity of cultivating it is eagerly sought. Hunter in his statistical account of the Bhagulpur District speaks of a caste called Gangauntas whom he describes as numerous and as being fishermen who cultivate the islands and banks newly formed in the bed of the Ganges (Vol. XIV p. 76). It is only for a portion of the year that the tract is culturable, and only crops suited to such cultivation that can be grown. There is no permanency, it merely happens that the soil carried in suspension by the flood streams and deposited on this tract is capable of this immediate limited use rendering intermittent and periodic cultivation of the land possible.

It is pressed on us that the settlement by the Government of this tract is inconsistent with its being a river bed. But I fail to see that. The peculiar properties of the deposited silt permit of cultivation and the mere fact that for a brief period in every year, the land can be used for purposes which make settlement practicable cannot prevent the land being a part of the bed of the river. This then is how matters stand; though the dry weather stream is at a considerable distance from the *bheels*, yet the flood stream of the rains covers them extending even beyond them right up to that which is the southern permanent bank of the Ganges and in the sense that it still serves to contain the river on the south in its greatest normal flow. So far I have dealt principally with the physical aspect of things, but beyond that there is much that supports the view that this bank is the

river's southern bank and that the depression to the north is still the river bed.

To begin with there is evidence which points to this being known as the river's southern bank.

Thus several witnesses depose to this. Then in the plan annexed to the plaint in the suit instituted by the present plaintiffs, but withdrawn in January 1904, 3 months before the institution of the present suit, the existence of this high bank is clearly indicated. This is omitted from the maps put forward in this suit.

So again in this notification of October 5th, 1904, the Government of Bengal refers to what obviously must be this bank as the "southern high bank" of the Ganges. True, this notification is subsequent to the present suit, but this hardly detracts from its value seeing that it cannot have been expressed in those terms for the purpose of creating evidence.

It is true that there is no direct evidence that the dry weather stream ever flowed along this southern high bank. There could not well be such evidence seeing that in the Revenue Survey map of 1847, the river is shown as flowing some miles to the north. But the Commissioner draws attention in the 31st para. of his report to what he describes as "significant facts which go to prove to a certain extent that it is not improbable that the river flowed along the foot of the high lands in some remote period in the past." And we learn from the judgment of the Subordinate Judge that this report has not been impeached by any of the parties at the trial.

Then there is another distinct body of evidence with helps to show that the bed of the Ganges has the extended limits for which the defendants contend. It is distinctly proved that there are a number of other *bheels*, in the neighbourhood of this part of the Ganges over which the defendants exercise the same *jalkar* rights as they claim in respect of the *bheels* in suit. They are in mouzas Sabour, Mathurapore, Madhipur, Panna Chowk, and Rajiuddinpur, Gopali Chak, mouzas in the Barari estate, mouzas Amapur and Ajodhyapur. It is worthy of notice that in the case of one of these *bheels* the Government at first contested the defendants' claim, but ultimately conceded it. And yet the defendants' right to this enjoyment rests on the same foundation as the claim they advance in this suit.

Their right is by virtue of their *jalkar* in the Ganges. But these *bheels* are not permanently connected with the dry weather

CIVIL.

1918.

Ahmadi Begum

v.

Tarak Nath

Jomhna, C.

CIVIL.

1918.

Ahmad Begum

Tarak Nath.

Jenkins, C. J.

stream of the Ganges, but only with its flood stream, as are the *bheels* in suit.

I need not refer in detail to all the *bheels* as to which this class of evidence has been given, it will suffice for me to mention three *jalkars*, Darhia, Digraha, and Deori. All three are connected with one or other of the *jalkars* in suit, they are all three circumstanced precisely as are those in suit, the defendants' enjoyment of these three *jalkars* is undisputed, and the defendants' right to them can only rest, as does their right to those in suit, on their being in the bed of the river Ganges.

Finally the defendants have (in my opinion) satisfactorily proved their long possession of the *jalkars* in suit. No doubt at one time these *bheels* were permanently connected with the main stream of the Ganges, and so long as that was so their *jalkar* rights over them could not be questioned. But it is the plaintiffs' case that this connection was closed up about 25 years prior to 1904 (plaint para. 12), and so it becomes important to ascertain who since that date have enjoyed the *jalkar* rights. The plaintiffs and the defendants each claim that possession has been with them. To prove their rival claims each side has adduced both oral and documentary evidence.

I will first deal with that of the defendants as on them the burden of proof rests. First they have called a number of witnesses, and these witnesses have been believed by the Subordinate Judge before whom they gave their evidence. Richardson J. agreed with this. This testimony, if believed, is amply sufficient to prove possession so that the only question is whether it should be believed. It has all been brought to our notice and subject to criticism by counsel for the plaintiffs, but I am unable to hold that the learned Subordinate Judge, and Richardson J. have misappreciated it. Moreover this oral testimony is supported by documentary evidence and first I will deal with the defendants' accounts. They have been placed before us with great clearness by Mr. Sinha, and we have been further assisted in our investigation of them by certain tabular statements prepared for our use. These statements demonstrate that Doss J. was mistaken in supposing that in 1892 there was a rise in the defendants' *jama* of the *jalkars* in suit which synchronised with the alleged dispossession of the plaintiffs by the defendants and was attributable to it. This dispossession is alleged to have begun not earlier than 1892, and Doss J. as corroborating this, remarks that the income from *jalkar* Maksuspur gradually rose

from Rs. 1,336 in 1865 to Rs. 1,550 in 1893, and the learned Judge goes on to refer to later successive rises in the income.

This has been utilised as an indication that the defendants were not in enjoyment of the *jalkars* in suit prior to 1892. But the fallacy in this reasoning is this : the income shown is that of the entire *jalkar* Maksuspur, and that *jalkar* comprises much more than the *bheels* in suit. It so happens that the defendants have kept separate accounts of the *jalkars* in dispute which were separately let, and those accounts in no way support the theory of the learned Judge. In fact the variation of the *jama* of the entire *jalkar* on which this theory is based, is due to variations in the income of other parts of the entire *jalkar*. These accounts so far from casting a doubt on the defendants' possession prior to 1892 lend considerable support to it, for they go to show receipt of *jama* in respect of Bhoorang, Kharia, and Chaprela from 1879, the date at which, according to the plaint, connection with the Ganges ceased. Finally there are *kabuliats* on which the defendants rely. The difficulty in regard to them is that it is not directly shewn that under them the *bheels* in suit were fished. Still the defendants are entitled to say that, having regard to the names appearing in them, the *kabuliats* are consistent with the defendants' case and that in any event they go to prove the defendants' possession of *jalkars* in this tract north of the southern high bank, and to that extent to support their case.

On the other hand, the oral evidence adduced by the plaintiffs to prove their possession has not been credited, and I do not see how we in appeal can say this was an erroneous estimate of the witnesses' credibility. On the contrary Mr. Sinha has brought to our notice features in the evidence of the witnesses for the plaintiffs which casts a doubt on their case. I refer particularly to the variance in the story as to the date of dispossession given in this suit and in that which was withdrawn, and also to the evidence of some of the witnesses that the flood was only for one year, a statement obviously untrue and made to discount an admission previously made. The material *kabuliats* on which the plaintiffs rely are, one of 1875, and the other of 1889. It is important to observe that the plaintiffs do not allege that in 1875, the *jalkars* were closed ; according to their plaint, it was in 1879. But if that be so, the *jalkars* there named cannot have been those in suit, at any rate, the plaintiffs would have had no right to lease them.

CIVIL.

1918.

Ahmadi Begum.

v.
Tarak Nath.

Jenkins, C. J.

CIVIL

1918.

Ahmad Begum

v.

Tarak Nath

Jenkins, C. J.

Apart from this in the lease of 1875 no mention is made either of Dagar or Khirkharia, two *jalkars* now claimed by the plaintiffs and Ghoramara is described as being in Mouza Imamnagar, though the plaintiffs' present case is that it is in Mouza Khijerpur, Exhibit 54 is dated the 5th of August, 1889, and purports to be a lease of *jalkars* in 9 Mouzas.

How *jalkars* Daribal and Manadhar came to be included is not apparent and the discrepancy in the enumeration of the Mouzas in the two leases is noticeable. The Subordinate Judge has dealt with these two *kabuliats* and drawn attention to circumstances that detract from their value as evidence of the plaintiffs' possession. He was not prepared to treat them as establishing this possession and I agree with him.

No doubt the accounts produced by the plaintiffs show that rents were received by them in respect of *jalkars*, but it is not shewn that they were the *jalkars* in suit, and in this connection it is to be borne in mind that the plaintiffs have *jalkars* in Tappa Madhuban south of the southern high bank of the Ganges. Nor is that all; the probabilities of the case too appears to me to favour the view that the possession of these *jalkars* was with the defendants.

It is not suggested that the defendants were not in possession until the connection of the *bheels* with the flowing stream was closed, that is to say, according to the plaint, in 1879; it is exceedingly unlikely they would have discontinued possession especially as in their view nothing had occurred to terminate their possession over these *bheels*. Then again it is the plaintiffs' case that they were dispossessed about 1892, but the Subordinate Judge does not believe this story; on the contrary he thinks that the criminal proceedings of 1892 and rioting in which Gokul Mahaldar was concerned, were attempts to oust the defendants.

And it certainly is difficult to reconcile with this story of the plaintiffs, the fact that they took no legal steps to recover possession until 1903 although the Magistrate expressly referred them to a Civil Court. The plaintiffs' version was that the dispossession began at Singhia Dhur; but if the defendants did dispossess the plaintiffs it is difficult to understand why the defendants should have commenced operations there, and not in the *bheels* to the west which were directly connected with Darbial, Digraha and Deori where the defendants' *jalkar* rights were not disputed. Mr. Sinha has offered an explanation which is at least plausible, it is that the plaintiffs' desire to utilize the

criminal proceedings under Act IV of 1840 which terminated in their favour in 1854. But if this be so, it is not much to their credit, for it is shown that the Singhia to which those proceedings related was Singhia Bahta Dhur in Mouza Mullickpore and not the Singhia Dhur of this suit. The conclusion to which I come is that the defendants are entitled to *jalkar* Maksuspur, that this *jalkar* extends from Mayagunge to Pirpainty, and that the *bheels* in suit are in the bed of the Ganges between those two points. As the case was placed before us prior to reply, these findings would have been conclusive in the defendants' favour, for it appeared to be conceded on behalf of the appellants that if the defendants were able to show that the *bheels* were in the bed of the Ganges, then their right to fish in them would follow. In reply, however, the learned vakil for the appellants contended for the first time that even if the *bheels* were held to be in the bed of the Ganges, still the defendants would have no *jalkar* right over them as they were disconnected with the main stream, during a part of every year. We were assured that it never was intended to make the concession which appears to have been made, and there can be no question as to the correctness of this assurance.

I must therefore deal with this point, though it is to be regretted that it was not made at an earlier stage. Reliance was placed on several cases, but I am not aware of one which negatives the defendants' claim now that it has been found that the *bheels* lie between the banks of the Ganges and in the bed of the river. The cases cited to us on behalf of the appellants were *Ramanath Thakoor v. Bshan Chandra Banerjee* (1), *Grey v. Anund Mohun* (2) and *Sarat Chandra Singh v. Kshitish Chandra Roy* (3).

In none of those cases did the facts really resemble the present, for in none was the *bheel* actually in the bed of the river, over which the claimant had *jalkar* rights. On the other hand, the decision as to *jalkar* Maksuspur to which I have already alluded and the case of *Jogendra Narayan Roy v. Crawford* (4) sanction the view that in circumstances like the present the *jalkar* rights of a river extend to waters in the river bed though they are not connected with the waters of the flowing stream throughout the year. Each case must depend on its own peculiar circumstances. Where the right of fishery is in a river then the Court has to be satisfied on a consideration of all the material facts and conditions whether it can fairly and

CIVIL.

1912.

Ahmad Begum

v.

Tarak Nath,

Jenkins, C. J.

(1) (1868) X. Sevea, 463. (3) (1910) 12 O. L. J. 216.

(2) (1864) W. B. 108. (4) (1906) 2 O. L. J. 569; I. L. B. 32 Cal. 1141.

CIVIL.

1918.

Ahmadi Begum

*
Tarak Nath.

Jenkins, C. J.

reasonably be said that the waters over which the fishery is claimed are a part of the river. In this case I think it may fairly and reasonably be said that the *bheels* in suit are throughout the year a part of the river Ganges. They certainly are such during a part of each year and they lie in that which throughout has been and still continues to be a part of the river bed. The water of these *bheels* is the water of the river Ganges and that is the source of the fish they contain. In the circumstances I hold that the temporary disconnection from the flowing stream occasioned by the fall of the waters cannot at any time deprive the *bheels* of their character of being a part of the Ganges. It was suggested for the plaintiffs that the defendants could only have access to the *bheels* by trespassing over the land of the plaintiffs. This case, however, was not suggested in the pleadings or issues or at any stage prior to the argument in reply on this appeal. This is obviously too late. In my opinion, therefore the defendants have established their title to fish in the *bheels*, so that it is unnecessary to discuss their contention that the plaintiffs have failed to prove that the *jalkars* in suit formed part of the assets upon which the settlement of Tappa Madhuban was made with them (cf. *Forbes v. Meer Mahomed Hossain* (1).

The result then is that (in my opinion) this appeal should be dismissed and the decree confirmed with costs.

Harington J.—The plaintiff in this case asked a declaration of his title to certain fisheries which lay within his *zemindari* Madhuban.

(2) A declaration that the defendants had no rights therein.

(3) That the defendants be ejected, possession given to plaintiffs and an injunction restraining the defendants from interfering with the plaintiff's fishery be granted.

The case for the defendants was that they were entitled to a fishery extending for some 44 miles along the Ganges. That the fishery in dispute comprised the whole bed of the Ganges, and included not only the permanently flowing stream but all waters within the permanent banks of the river whether temporarily severed from the stream or not.

The plaintiffs deny that the defendants had such a right and say that the fishery of the defendants only comprises the permanently flowing stream of the Ganges, and does not include waters which for the great part of the year are separated from that river.

As the case was presented to us at first it was conceded that if the waters in dispute lay within the banks of the Ganges the defendant must succeed—but this admission was at a very late stage of the case withdrawn and it was contended by the appellant that even if the waters in dispute lay in the river bed, yet nevertheless that as they were not permanently connected with the river Ganges they were not included in the defendants' fishery.

The Subordinate Judge found in favour of the defendants. The plaintiffs appealed and the appeal came on before Doss and Richardson JJ. who differed; the former being of opinion that judgment should have been given for the plaintiff while the latter thought that the appeal would be dismissed.

That a fishery known as *jalkar* Maksuspur has existed for very many years in the Ganges between Bhagalpur and Pimpainthy there can be no doubt. It is mentioned in documents as old as the eighteenth century—it bears a separate Touzi number—and is assessed as a separate revenue paying mehal. That the defendants are proprietors of this *jalkar* Maksuspur is not disputed.

The first question to be solved is of what did *jalkar* Maksuspur consist? Was it an exclusive right of taking fish in the flowing stream of the Ganges and in such arms of inlets as were permanently connected with the river or was it a right to take fish to the exclusion of all others in the waters of the Ganges lying between the north and south banks? In other words, was it a right to take fish in the bed of the Ganges, as distinguished from a right to take fish only in the permanent stream of the Ganges.

If the right was to take fish in the bed of the Ganges, then the decision of the case depends on the question whether the *jalkars* in suit were in the bed of the Ganges. If on the other hand the grant was only of a right to take fish in the stream of the Ganges, the question whether the right could be exercised in arms of the Ganges which during the dry weather are unconnected with the stream has to be considered.

In my view the answer to this question must depend on what were the terms of the grant and I do not think that much assistance can be got from cases referring to other fisheries created by other grants.

In this case the grant has not been produced but there is evidence as to the extent of the rights which the defendant

CIVIL.

1918,

Ahmadi Begum

Tarak Nath.

Harrington, J.

CIVIL.

1918

Ahmad Begum
v.
Tarak Nath.
Harrington, J.

acquired. This evidence consists of old documentary evidence having a direct reference to the extent of the grant and evidence of the extent to which for many years past the defendants have exercised the right of fishery under the grant.

An early account of the fishery is given in a letter written by the Collector of Bhagalpur to the Board of Revenue in September 1799, to which is attached the answers of the *Canungoes*.

From this letter it appears that one Roy Kripanand had an estate in pergunah Colgong extending a considerable distance along the banks of the river Ganges; in this estate was a fishery called Maksuspur comprehending the entire stream between both banks of the Ganges, giving the proprietor the right of preventing those fishermen whom he had not licensed from fishing in that part of the Ganges which was bounded by mouzah Maksuspur on the one side and by the parallel bank on the other. This fishery formed a separate mehal.

Roy Kripanand fell into arrears with respect to the payment of revenue: when his estate was sold the fishery Maksuspur was sold separately unaccompanied by a single foot of land and bought by one Bhawani Prosad.

The *Canungoes'* answers describe what Bhawani Prosad purchased as the entire fishery extending from bank to bank. They say it is bounded on the eastward by the western extremity of Tappa Madhuban. To the westward by Mayagunge and to the north and southward by the banks of the river including not only the whole course of the river but all water flowing or stagnant on both banks, including those of Bisampore, Sookteah, and Tallokah Ismailpore on the northern bank.

Later as appears from the letter of the Collector dated 1st June 1860, the eastern boundary was described as Pirpainthy, but no substantial question is pressed as to the east and west boundaries of the fishery; the real question is whether the southern boundary extends sufficiently far to the southward to take in the water in dispute.

Now both Pirpainthy and Maksuspur are marked in the revenue map which has been produced, and it is to be observed that according to that map each of these places is at a considerable distance, south of the permanent stream of the Ganges as shewn on the map.

Maksuspur lies roughly west-south-west of Pirpainthy; if a straight line were drawn joining these two places on the

map the waters in dispute would lie about that line some to the north and some to the south of it.

The defendants' case is that the permanent south bank of the Ganges curves southward from Pirpainthy coming again north to Maksuspur in the form of a crescent and it is this high bank which forms the south boundary of his fishery. Considerable light is thrown on this question by the litigation which took place in 1866 when the question arose as to a fishery in a deara which formed in the river. It seems that when the *jalkar* in the deara closed up and became severed from the waters of the river the zemindar laid claim to it but it was held in the lower Courts and in this Court to be within plaintiffs' fishery mouzah Maksuspur. The learned Judges of this Court lay particular stress on the letter of September 1799 and say that the plaintiffs' right was not only to fish in the Ganges itself but was a general right of fishery within certain limits—these limits being on the north and south bank of the Ganges and that the right expressly included stagnant as well as running water.

The plaintiffs contend that this case has no bearing on the question in dispute because the deara was an island, surrounded by the flowing stream of the Ganges, so that in any case it must have been between the banks of the Ganges whether these banks are taken at the high or low water season.

The evidence shows that the river Ganges has, at this spot where the fisheries in dispute lie—a great but regular yearly change in its breadth. In the hot weather when the waters are low the river is from 1 to 2 miles in breadth. In the rains when the waters are high it is some 8 to 10 miles in breadth.

On the south of the land in which the disputed *jalkars* are is a railway line. The Commissioner describes the southern bank of the river, which is a short way to the north of the railway line, as a bank nearly in a crescent form. The Commissioner saw the place in the rainy season. At that time the water came right up to the high bank which the defendant contends is his southern boundary—the *jalkars* in dispute were all covered and formed one sheet of water with the Ganges. On one side it is said that this large area containing several miles of land cannot be regarded as the bed of the Ganges because during certain months of the year it is under cultivation and rabi crops are grown on it—and moreover there are villages on it while on the other hand it is contended that as the land in question is regularly covered by the river it is part of the river bed.

CIVIL.

1913.

Ahmadi Begum

v.

Tarak Nath.

Harrington, J.

CIVIL.

1918.

Ahmadi Begum

Tarak Nath.

Harrington, J.

The question as to what constituted the bed of a river was discussed by A. L. Smith, L. J. in the case of the *Thames Conservatory v. Smeed Dean and Co.* (1), and he describes it as that portion of the river which in the ordinary and regular course of nature covered by the waters of a river. It need not be constantly covered if in the ordinary course of things it is habitually covered. He adopts this definition "the bed of the river is that portion of its soil which is alternately covered and left bare as there may be an increase or diminution of the supply of water, and which is adequate to contain it at its average and mean stage during the entire year without reference to the extraordinary freshets of the winter or spring or the extreme droughts of the summer or autumn." If this definition which was originally given in reference to an American River and applied by A. L. Smith, L. J. in the case of the Thames, can be applicable in the case of a river so unlike the Thames as the Ganges is, then the site of the *jalkars* in suit must be within the bed of the river for they are regularly and habitually covered by the river for some two months in the year during the rains, and they lie within defined banks. Extraordinary floods may make the river overflow the banks and cause an inundation but in the absence of extraordinary floods, the river regularly, year by year, comes up to what does not extend beyond this bank in the ordinary course of nature.

The fact that in the tract situated between the banks, there are villages which are surrounded by water for a couple of months in the year, when the river is full, does not seem to me to affect the question whether the tract is the bed of the river. I think the tract is the bed of the river because it is habitually and regularly covered by the river for a substantial portion of the year in the ordinary course of nature.

In para 12 of the plaint the plaintiffs allege that no branch of the Ganges was connected with the *jalkars* in dispute for 25 years before the suit *i.e.*, since about 1879. Prior to that date therefore on the plaintiffs' own showing the *jalkars* in dispute were part of the Ganges but nevertheless there is produced a *kabuliyat* executed in favour of the Kapaljauru concern by one Gokul the lessee of the plaintiffs in respect of a *jalkar* mehal which apparently includes some of the waters now in dispute—and this looks like an endeavour to disturb the defendants' possession when even on the plaintiffs' own showing

(1) (1907) 2 Q. B. 834 (838).

the waters remained connected with the Ganges. On the other hand it is possible that the lease refers to other waters outside the banks of the Ganges for the defendants lay no claim to any fisheries in the mouzah which lie outside the banks of the Ganges. But from whichever point of view it is looked as it does not help the plaintiffs—if it purports to deal with the waters in dispute—it is inconsistent with the plaint: if it deals with waters outside the banks of the Ganges it is irrelevant.

But an attempt was made by Gokul in 1892 to interfere with the defendants' fishing and a riot took place between the persons who had been licensed to fish by the defendants' lessee and Gokul who had obtained a settlement of all the *jalkars* in Tappa Madhuban from the zemindars.

Some time before this riot *viz.* in October 1891 Gokul had presented a petition complaining of an obstruction to his fishing by men acting on behalf of the zemindar of *jalkar* Maksuspur but the Magistrate made no order on the ground that he considered the case one for a civil Court. Instead however of going to the civil Court Gokul had recourse to violence which resulted in his being convicted and sentenced to 6 months' rigorous imprisonment under section 147 Indian Penal Code. The result of this proceeding is to show that the plaintiffs had not possession of the fishery in dispute in 1892—and yet no recourse is had to the civil Court until 1904.

There are on the other hand a number of leases granted by the lessees of the defendant to various fishermen of which the earliest is dated 1859 and the latest 1898 but though these relate to fishing in *jalkar* Maksuspur they do not generally speaking refer to the waters in dispute by name. Some however do give details of the water, and expressly refer to waters lying within mouzah Madhuban.

There is oral evidence too to show that the lessees of the defendant caught fish in the disputed water and even the plaintiffs witnesses concede that the western portion of some of the Dhars in dispute which lies westward to the boundary of Madhuban are fished by the lessees of the defendant and not by the lessees of the proprietor of the zamindari within those boundaries they lie.

Without going in detail into this mass of evidence, I think that the conclusion to be drawn from the oral and documentary evidence is that the defendants continued to exercise the right of fishing in the waters in dispute after they had ceased to be

CIVIL.

1913.

Ahmad Begum

Tarak Nath.

Harrington, J.

CIVIL.

1918.

Ahma H Beguin

v.

Tarak Nath.

Harington, J.

part of the permanent stream of the Ganges and that the only efforts which the plaintiffs made to oust them from this fishery were unsuccessful.

There was a further point which was pressed by the plaintiffs.

He contended that an examination of the accounts shewed that after the time he alleged that the defendants ousted him from the fishery his income fell, while the revenue the defendants got from the fishery rose.

Even if this were established it would be at the best very indirect evidence—but it is sufficient to say that an examination of the accounts does not establish that there was in fact a rise in the revenue of that portion of the *jalkar* in which the waters in dispute are situated.

There is then the point which was taken in reply, *viz.*, that any rights the defendants might have had in the waters in dispute came to an end when these waters ceased to be permanently connected with the river Ganges.

In support of the proposition reliance is placed on the cases of *Ramanath Thakoor v. Eshan Chand Banerjee* (1) and *Gopse-nath Rai v. Ramchunder Turkalunkar* (2) and *Sarat Chandra Singh v. Kshitii Chandra Roy* (3).

In the last of those cases the facts were dissimilar from those of the present case : because in that case the subject of dispute was a *bheel* which was permanently severed from the river and remained in a state of isolation from the river except when unusual floods made the river inundate the entire country.

The first case tells against the appellant for there it was laid down that the grant of fishery must be *prima facie* confined to the river and sheets of water communicating therewith and the Judges intimate that if the right of fishery had been exercised from the time of the settlement over the piece of water in dispute or over pieces of water similarly circumstanced that might show that the fishery at that time had extended to that piece of water.

The other case *viz.*, *Gopse-nath Rai v. Ramchunder Turkalunkar* (2) is also distinguishable in point of fact because it was there found that the *jheel* in question did not form any part of the river channel.

These cases do not establish that as a matter of law that when a fishery is granted in a river the grant can only include

(1) (1868) Seven 463.

(2) (1808) Seven 407.

(3) (1910) 13 C. L. J. 216.

the right of fishing in the back waters of the river as long as they are permanently connected with the stream. Here such evidence as we have of the terms of the grant shews that it was a grant to fish in all the waters of the Ganges stagnant or flowing between the banks. For reasons I have given I think the banks mean the permanent high banks which mark the boundary of the river when it is at its highest in the ordinary course and if that is so it is difficult to imagine what the word the stagnant refers to unless it refers to those pieces of water which are one with the river when it is high—but are cut off and become stagnant when it is low. The water in such stagnant pools is the water of the Ganges—and the fish in them are the fish of the Ganges. It does not seem to me that it can well be said that they are not included in a grant of the fishery even where that fishery includes stagnant as well as running water.

Two other cases which were referred to one of which is directly against the plaintiffs' contention. In *Jogendra Narain v. Crawford* (1) it was held that the fishery remained in the waters in dispute notwithstanding that they were temporarily severed from the river in which the fishery was granted—in the second, *Ishan Chandra Dass v. Upendra Nath Ghosh* (2) in which it was held that the right of fishery had been lost—the grant was of a *jalkar* in the flowing stream of the Padma, while the water in dispute had been permanently severed from the Padma for many years.

In my view therefore the last contention raised by the plaintiffs is unsustainable and inasmuch as the defendants' *jalkar* extended from bank to bank, and these disputed waters lie between the banks of the Ganges—the plaintiffs' suit must fail.

Hookerjee J.—I am in full agreement with the conclusions set out in the judgment delivered by the learned Chief Justice. But I propose to review the circumstances of the litigation very briefly, as the two members of this Court who heard the appeal from the decision of the Subordinate Judge took divergent views on the subject.

The questions which emerge for consideration from the elaborate arguments addressed to us lie in a narrow compass. The first thirty-five plaintiffs are proprietors of a permanently settled estate in the District of Bhagalpur known as Tappa Madhuban; the thirty-sixth plaintiff is lessee under them. The first three defendants claim to be grantees from the crown of

CIVIL

1918.

Ahmadi Begum

v.

Tarak Nath.

Harington, J.

(1) (1905) I. L. R. 32 Cal. 1141.

(2) (1906) 12 O. W. N 559.

CIVIL.

1918.

Ahmadi Begum

v.

Tarak Nath.

Mookerjee, J.

a fishery in the flowing river Ganges called *jalkar* Maksuspur; they also set up a title to the fishery by long possession. The fourth defendant is a lessee under the first three. The plaintiffs seek to establish their title to fishery rights in certain sheets of water called bheels which are included within the ambit of their permanently settled estate; they allege that the defendants have unlawfully interfered with their enjoyment of this territorial fishery. They consequently ask for declaration of their title, recovery of possession and meane profits as also a permanent injunction to restrain the defendants from a repetition of their unlawful acts. The defendants resist the claim, substantially on two grounds, *vis.*, *first*, that it is barred by limitation and *secondly*, that the *jalkars* are situated in the bed of the river Ganges and are consequently comprised in *jalkar* Maksuspur. Two questions, accordingly, require examination, *first*, limitation, and, *secondly*, title.

It is plain that no question of limitation really arises in the case. The suit has no doubt been framed as primarily a suit for possession; but it is in essence a suit for an injunction to restrain the defendants from committing what must be deemed a continuing wrong if they fail to establish their alleged title. The defendants do not claim any title to the soil covered by the waters in which they set up a right to fish. They claim fishery rights under a grant from the crown; if they establish this grant, the suit must be dismissed on the merits. If the defendants fail to establish the grant and rely upon possession, they must show that they have acquired a statutory right of easement, because, as pointed out in *Chundee Churn v. Shib* (1) and *Lokenath v. Jahania* (2), a profit *a prendre*, such as a right of fishing in another's waters is an easement within the meaning of that term as defined in section 3 of the Indian Limitation Act, 1877, though it is worthy of note that the case of *Abhoy Charan v. Dwarka Nath* (3) raises the question whether an exclusive right of fishery in a tidal and navigable River can be acquired by proof of mere enjoyment in the manner provided in the statute without a grant from the crown. In any view, as a trespasser cannot by the very act of trespass immediately and without acquiescence on the part of the owner, become possessed of the property upon which he has trespassed, till the statutory period has elapsed, the wrongful act of the defendants can only

(1) (1880) I. L. R. 5 Calo. 945; 6 C. L. B. 269.

(2) (1911) 14 C. L. J. 572.

(3) (1911) I. L. B. 89 Calo. 58.

be deemed acts of trespass, and as provided in section 23 of the Indian Limitation Act, in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the wrong continues. Consequently, the problem of which solution must be sought is that of the title alleged by the defendants.

The plaintiffs, it is not disputed, are proprietors of the permanently settled estate Tappa Madhuban; *prima facie*, therefore, they are proprietors of the territorial fisheries comprised within the ambit of their estate. But it is open to the defendants to put the plaintiffs to the proof of the fact that the *jalkars*, at the time of the permanent settlement, formed part of the assets of their zamindari. *Forbes v. Meer Mahommed Hossein* (1); and the question would have been of vital importance, if it had been proved that the predecessors of the defendants were, as in the case before the Judicial Committee, in possession of the *jalkars* at or before the decennial settlement. This aspect of the case, however, though suggested in the written statement of the defendants in the primary Court and pressed by their learned Counsel in this Court, does not appear to have been clearly developed at the trial, and need not be further examined in view of our conclusion on the other points in the case.

It has not been disputed in this Court that the defendants are owners of fishery rights in the river Ganges comprised in *jalkars* Maksuspur. This, indeed, is established by unimpeachable documentary evidence, though the original grant has not been produced. It may be stated here that reference was made to a passage from Hunter's Statistical Account of Bengal to show that *jalkar* Maksuspur was granted in the time of the Muhammadan Rulers of the country and has been in existence from the 17th century. I am not prepared to hold that reference can legitimately be made to statements in Hunter's Statistical Account for the purpose of establishing the existence of private rights, though I am not unmindful of the decision in *Lal Achal Ram v. Kasim Hossein* (2) where the question does not appear to have been argued. The point, however, is not of vital importance, whether or not the *jalkar* Maksuspur has been in existence from pre-British times. What is really relevant is, the grant as recognised at the time of the Permanent Settlement.

(1) (1378) 12 B. L. R. 210; 20 W. R. 44.

(2) (1905) L. B. 82 I. A. 118; I. L. B. 27 All. 271

CIVIL

1918.

Ahmadi Begum

vs.

Tarak Nath.

Mookenjee, J.

CIVIL.

1918.

Ahmadi Begum

v.

Tarak Nath.

Mookerjee, J.

That grant as already stated has not been produced, but the existence of *jalkar* Maksuspur is conclusively established by means of recitals in documents very nearly contemporaneous with the Permanent Settlement. The name is mentioned in a paper which is apparently a list of *jalkars* in pergunah Kahalgaon in 1791. It is mentioned again in a Register of 1794 of revenue paying estates in Bhagalpur. It was, we also find, the subject of correspondence in 1799 between the Collector of Bhagalpur and the Board of Revenue at Calcutta. This last document indicates that originally, at the time of the Permanent Settlement, the *jalkar* asset was included in the permanently settled estate, but when the estate fell into arrears, a portion thereof only, inclusive of the *jalkar* was sold on the 27th September, 1796, at the instance of the Collector for realisation of the revenue. This possibly explains how the fishery right came to be separated from the land, and may furnish an answer to the objection, forcibly urged by the appellants, that if the fisheries claimed by the defendants were comprised in the bed of the river, it is extremely unlikely that the river bed should have been included within the ambit of their permanently settled estate Tappa Madhuban.

We start, then, with the well established fact that the defendants are owners of *jalkar* Maksuspur in the river Ganges. The substantial point in controversy is, what are the boundaries of this *jalkar*. Upon a careful examination of the proceedings in the Court below, as also of the arguments addressed to the learned Judges who heard the appeal in the first instance, it is fairly clear that no question was raised as to the eastern and western boundaries. The documentary evidence shows that in the stretch of the river between Monghyr on the west and Soonti in the east, there are three *jalkars*, first, from Rahuknala in Monghyr to Mayaganj in Bhagalpur, another from Mayaganj to Pirpainthi and a third from Pirpainthi to Soonti. We are concerned in the present litigation with the second of these *jalkars*, and the case has been tried on the assumption that it extended from Mayaganj on the west to Pirpainthi on the east. Some difficulty may possibly be created by the fourth answer of the *canungoe*, appended to the letter dated the 9th September 1799; but the point was not really in controversy in the Court below, and this appeal must be determined on the footing that the western boundary of *jalkar* Maksuspur is Mayaganj and the eastern boundary is Pirpainthi. The controversy has centred

round the question, where are the northern and southern boundaries of *jalkar* Maksuspur. The appellants contend that the southern limit of the *jalkar* is the southern edge of the dry weather stream of the river Ganges; the respondents contend, on the other hand, that the southern boundary is the high bank which forms the southern limit of the stream when it is full during the rains. If the contention of the appellants prevails, the disputed *jalkars* must be deemed outside the bed of the river Ganges; if the contention of the respondents is established, the *jalkars* are in the bed of the river itself. In other words, the question in controversy reduces to this: What is the southern limit of the bed of the river in that part of the country. A similar question would be involved in the determination of the northern boundary of the *jalkar*, if the investigation of that question were necessary for the purposes of this litigation. It is fairly clear upon the evidence that during the hot weather, when the stream shrinks to its minimum size, the river is from one to two miles broad, while during the rains when the river is full, the breadth of the stream is as much as ten miles in some places. Consequently the question may be put as follows—Is the river bed from one to two miles in width or is it ten miles in width? Or, if the question is considered from a somewhat different standpoint, it may be asked, when the stream expands during the rains and attains a breadth of ten miles, is that expanse of water still the flowing river or is it merely flood or inundation? The elements which support the view that the expanded stream is really the river at its fullest, are these—*first*, the height of what is called as the southern high bank above the low land to the north stretching towards the stream when it is narrowest; *secondly*, the alluvial character of the soil of this low land; *thirdly*, the nature of the vegetation grown on it; *fourthly*, the annual recurrence of the phenomenon of the expansion of the stream; *fifthly*, the length of time during which the expanded stream continues to retain its maximum size; *sixthly*, the existence of currents at the southern extremity of the expanded stream; and, *seventhly*, the presence of marks of towing ropes on what is called the southern high bank, indicating that at some time or other the river must have extended as far south as the high bank. On the other hand, the elements upon which the appellants rely to support their theory that the stream as it exists during dry weather is the real river Ganges, which inundates the surrounding country during the rains as the

CIVIL.

1918.

Ahmadi Begum

Tarak Nath

Mookerjee, J.

CIVIL

1918.

Ahmad Begum

v.

Tarak Nath.

Mookerjee, J.

stream can no longer be contained within its narrow bed, are as follows: *first*, the distance between what is called the southern high bank and the southern edge of the stream in dry weather, namely, from five to six miles; *secondly*, the fact that there are groups of villages inhabited by cultivators on this long stretch of land; *thirdly*, the fact that when the water subsides, the land is regularly cultivated and winter crops are grown. In my opinion, the inference to be drawn from all these circumstances is that what is described as the southern high bank is the southern bank of the river. This view is confirmed by the remarkable fact that the appellants themselves realised the full effect of some of the circumstances already mentioned, specially, the regular recurrence of the expansion of the stream, the length of the period of time during which the expanded stream is maintained at its maximum size, and finally the existence of currents therein; the witnesses for the appellants endeavoured, though unsuccessfully, either to deny altogether the existence of these facts or to minimise them as far as practicable. But it has been strenuously argued on behalf of the appellants that the bed of the river is the channel in which the water flows continuously throughout the year. This contention cannot possibly be supported. It is indisputable that in the words of the digest "that is considered to be the bank which contains the river when fullest" (Digest 43, 12, 3); Ware on Roman Water Law, section 41. Consequently, the bed of the river is understood to be the whole of what contains its waters when most swollen, in whatever time of the year, without leaving its channel and overflowing its banks. When the river is at its full flow, be that by the daily flow of the tide or by the natural increase of its waters occasioned by rain or the like cause, filling its natural bed to its highest reach of flow, it marks its high water, while its diminished range of flow by summer heats shows its low water mark. In other words, as Grotius puts it, (War and Peace, 2, 8, 9), 'the bank is the outermost part of the bed in which the river naturally flows at its fullest.' On this passage Vinnius comments, 'this signifies that that space next to the bank, which is sometimes not occupied by the river, when reduced by heats in the summer season, is not a part of the bank.' This justifies the statement of Hotick (Navigable Rivers, page 6), that the bed of a river is the space between the banks occupied by the river at its fullest flow; so that the bank of a river is no part of its bed, for the bank ends at the line to which the water rises at its highest flow, and,

though the space next below it is sometimes uncovered by the river, when reduced to its lowest flow, yet the space so uncovered is not a part of the bank but of the bed of the river; the bank is thus the border of the bed within which the river flows when in its fullest state naturally, that is to say, when not temporarily overflowed by extraordinary rains. The subject was lucidly discussed by Mr. Justice Curtis in delivering the judgment of the Supreme Court of the United States in *Howard v. Ingersoll* (1). 'The banks of a river are those elevations of land which confine the waters when they rise out of the bed, and the bed is that soil so usually covered by water as to be distinguishable from the banks by the character of the soil or vegetation or both, produced by the common presence and action of flowing water. But neither the line of ordinary high water mark nor of ordinary low water mark nor the middle stage of the water can be assumed as the line dividing the bed from the banks. The line is to be found by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line, between the bed and the banks, will be found above or below or at a middle stage of water, must depend on the character of the stream. The height of a stream during much the larger part of the year, may be above or below a middle point between the highest and the lowest flow. Something must depend also upon the rapidity of the stream and other circumstances. But, in all cases, the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules but as other natural objects are sought for and found, by the distinctive appearance they present; the banks being fast land, on which vegetation appropriate to such land in the particular locality grows wherever the bank is not too steep to permit such growth and the bed being soil of a different character, and having no vegetation, or only such as exist when commonly submerged in water.' To the same effect is the statement in *Alabama v. Georgia* (2): "It is the running water of the river that makes its bed; for it is that and that only, which leaves its indelible mark to be readily traced by the eye; and wherever that mark is left, there is the river's bed; it may not be there to-day, but it was there

CIVIL.

1918.

Ahmad Begum

Tarak Nath.

Mookerjee, J.

(1) (1851) 18 Howard 381 (437). (2) (1859) 28 Howard 505 (515).

CIVIL.

1913.

Ahmad Begum

Tarak Nath.

Mookerjee, J.

yesterday; and when the occasion comes, it must and will—unobstructed—again fill its own natural bed." This view was substantially accepted in *Hindson v. Ashby* (1), *Thomas Conservatory v. Smed & Co.* (2). Judged from this point of view, the contention of the appellants cannot be accepted as sound. It is indisputable upon the evidence that from year to year, during the rains the river attains a breadth which varies from 8 to 10 miles, and this state of things continues during a period of at least two months. There is no room for suggestion that this is an accidental phenomenon, a flood or an inundation, a temporary overflow due to extraordinary rains or some similar exceptional cause. The evidence consequently tends to support the view that the disputed *jalkars* stand on land which is included in and is part of the river bed. It has been suggested, however, that this view, if carried to its logical conclusion, may create difficulties in the application of the law of accretion, and, reference has, in this connection, been made to the judgment of the Judicial Committee in the case of *Lopez v. Muddun Mohun Thakoor* (3), where James L. J. described the bed of the sea or public river belonging to the State as "public domain not usable in the ordinary sense." Reference has also been made to observations in the cases of *Narain Koomares v. Nawab Nazim of Bengal* (4), *Nobin Kishore Roy v. Jogesh Pershad Gangooly* (5), *Kanta Proshad Hojari v. Abdul Jamir* (6) and *Seabkrsto v. East India Co.*, (7). I do not feel pressed by the difficulty suggested; It may show at best that the principle which must be applied to the solution of the question raised in the present case should not be extended and carried to what may seem to be its logical sequence. Consequently the only inference legitimately deducible from the facts clearly established in the evidence is that the *jalkars* stand on the river bed. This view is fortified when the evidence of possession is examined. On this part of the case, there is no reason why the oral evidence on the side of the defendants should be rejected. That evidence has been believed by the Subordinate Judge, and, sufficient reasons have not been made out to support the contrary view. At one stage of the argument, much stress was laid on the assertion that the accounts produced by both the parties indicate that the increase in the

(1) (1896) 1 Ch 78 (84); (1896) 2 Ch. 1 (25).

(2) (1897) 2 Q. R. 384.

(3) (1870) 13 M. I. A. 467 (475); 5 B. L. R. 521; 14 W. R. P. C. 11.

(4) (1865) 4 W. R. 41.

(5) (1904) 8 O. W. N. 476.

(5) (1870) 14 W. R. 352.

(7) (1856) 6 M. I. A. 267.

income of the defendants synchronises with the increase of the income of the plaintiffs, and that this began in the year 1891 when the plaintiffs alleged that they were dispossessed. Upon a closer examination of the accounts, however, this theory was completely negatived. On the other hand, the *kabulyats* produced by the defendants, in so far as the *jalkars* mentioned therein can be identified, tend to support their allegation of possession. But I do not attach very great importance to the *kabulyats* on either side, because the descriptions of the properties demised are vague, and an additional difficulty is created by the fact that different *jalkars* are in the locality called by the same name, while the same *jalkar* has different names given to it by different people. Considerable weight, however, must be attached to another remarkable circumstance, namely, the undoubted fact that the defendants have been in occupation of other *jalkars* in respect of which their possession would be wrongful except on the theory that those *jalkars*, similarly situated to the *jalkars* now in controversy, covered land forming part of the bed of the river. In respect of one of these *jalkars*, the Government challenged the title of the defendants, but subsequently recognised the validity of their claim. In respect of another *jalkar*, which lies within the estate of the thirty-sixth plaintiff, it is noteworthy that the title of the defendants has not even been contested. On the whole, therefore, the conclusion becomes irresistible that the *jalkars* in dispute form part of the river bed and that the defendants have been in occupation thereof as comprised in their *jalkar* Maksuspur.

It has finally been argued on behalf of the appellants that even if the disputed fisheries be deemed to be situated in the bed of the river Ganges, the defendants as owners of *jalkar* Maksuspur are not entitled to them, inasmuch as they are during at least a part of the year disconnected from the continuous flowing stream. In support of this proposition, reliance has been placed on the cases of *Grey v. Anandamohan* (1), *Rimnath Thakoor v. Eshan Chandra Banerjee* (2) and *Sarat Chandra Singh v. Kshitish Chandra Roy* (3). Reference has also been made to the cases of *Jogendra Narayan v. Crawford* (4), *Pestab v. Unoda* (5) and *Hanbury v. Jenkins* (6). The cases relied upon do not really assist the contention of the appellant. The case of *Sarat Chandra v. Kshitish Chandra* (3), shows that a grant of fishery

CIVIL.

1918.

Ahmadi Begum

v.

Tarak Nath.

Mookerjee, J.

(1) (1864) W.B. 108. (4) (1905) 2 O. L. J. 58; I. L. R. 32 Cal. 1141.
 (2) (1888) 8 Ves. 468. (5) (1888) 8 Ves. 754.
 (3) (1910) 12 O. L. J. 316. (6) (1901) 2 Ch. 401.

OIVIR.

1918.

Ahmad Begum

Tarak Nath.

Mookerjee, J.

right in a river does not give to the grantee a title to fish in sheets of water adjacent to the river with which the river communicates only in the time of floods. This principle, however, has no application to *jalkars* situated in the bed of the river itself; the grantee of fishery right in the river is entitled to fish in all waters comprised within the banks of the river, and the circumstance that a particular sheet of water may, during part of the year, be disconnected from the flowing stream or permanent current does not affect the rights of the grantee. A *jalkar* so situated in the river bed, is essentially part of the river, and the fish contained therein may properly be deemed fish of the river. Consequently, the defendants must be taken to have established their *jalkar* right in the disputed sheets of water, which are situated in the bed of the river Ganges within its banks and are accordingly parts of the river itself. On these grounds, I agree that the decree of the Subordinate Judge must be affirmed.

A. T. M.

Appeal dismissed.

CRIMINAL REVISION.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice,
Sir Harry Lushington Stephen, Knight, Judge and
Sir Asutosh Mookerjee, Knight, Judge.*

CRIMINAL.

1918.

June, 30.

IN THE MATTER OF MATI LAL GHOSE (EDITOR)
AND TARIT KANTI BISWAS (PRINTER AND
PUBLISHER) OF THE "AMRITA
BAZAR PATRIKA."*

High Court, jurisdiction of—Contempt of Subordinate criminal Court—Printing and publication of articles in newspaper—Legal evidence—Statement on information and belief—Notice of motion, when can be amended—Sadar Nizamat Adalat—Court of Record—Civil and criminal contempt, distinction between—Criminal Procedure Code (Act V of 1898), Sec. 108—Court, when can make order for attachment for contempt of Court—Contempt of Court by publication—Cases to be pursued—Positive evidence.
A contempt of Court in respect of printing and publication of articles in a

* In the matter of an application before Special Bench of the High Court,

newspaper tending or calculating to interfere with the due course and administration of justice, is a criminal offence and no person can be punished for it, unless that offence be proved by legal evidence. A statement resting on information and belief is not legal evidence in such a case.

In re Pollard (1) and *The Queen v. Stanger* (2) referred to.

A Judge will be very slow to give leave to amend the notice of motion, if it were in any way likely that by so doing an injustice would be done to any party.

Neither the Supreme Court nor the Sadder Dewany Adalat had authority to punish a contempt of a Court not Subordinate to its authority.

The Sadder Nizamut Adalat was not a King's Court but the Company's Court, and was not a Court of Record, though it had power of Superintendence over Subordinate criminal Courts.

The Sadder Nizamut Adalat, when it was abolished, had no jurisdiction to punish for a contempt of a Subordinate criminal Court; and its authority to punish for contempt of itself was of a somewhat restricted character.

The High Court, by the express terms of the Letters Patent, is a Court of Record and every Court of Record has the power of summarily punishing for contempt of its authority.

In re Abdool (3) referred to.

The High Court has a right to treat as a contempt any act committed within the local limits of High Court's Original Jurisdiction that may affect its trial on appeal, and in particular any act that may tend either to taint or impair that evidence or to cause evidence that would otherwise be forthcoming.

Ordinarily one Court cannot punish a contempt against another Court or Judge. This is based on the doctrine that the offence is substantially criminal and the power to punish it is vested alone in the Court whose judicial authority is challenged. The position, however, is different where the contempt is against subordinate officers of the Court; such a contempt is regarded as contempt of the authority of the Court by which the officer was appointed and may be punished.

The High Court as a Court of Record has no authority to punish for contempt of the subordinate criminal Court, merely because it exercises power of superintendence over that Court or because that Court is subject to its appellate and revisional jurisdiction.

Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court (4) and *H. v. Davies* (5) explained.

In re Venkat Rao (6) dissented from.

The Court will not make an order for the attachment for contempt of Court, unless it is satisfied beyond dispute that the order is needed peremptorily in the interests of the administration of justice.

The usual rule, when a motion for contempt is dismissed, is that the respondent's costs should be paid.

Per Jenkins O. J. A man in a criminal proceeding need not deny that which is not legally proved against him.

CRIMINAL

1913.

In the matter of
The Amrita Bazar
Patrika;

(1) (1848) L. R. 2 P. C. 106.

(2) (1871) L. R. 6 Q. B. 362; 40 L. J. Q. B. 91.

(3) (1867) 8 W. R. cr. 32.

(4) (1883) 1 L. R. 10 Cal. 109; L. R. 10 J. A. 471.

(5) (1905) 1 K. B. 32.

(6) (1911) 21 M. L. J. 882.

ORIGINAL.

1913.

In the matter of
The Amrita Bazar
Patrika.

The Queen v. Stanger (1) referred to.

Obiter—In a civil proceeding, a statement on information and belief is not admissible except on an interlocutory application, and then the grounds of such belief must be stated.

'Positive evidence' has a recognised and distinct signification and means evidence which goes expressly to the very point in question; and that which, if believed, proves the point without aid from inference or reasoning as the testimony of an eye-witness to an occurrence as distinguished from indirect or circumstantial evidence.

The true implication of section 198 of the Criminal Procedure Code is, that the judgment of the Local Government should be specially directed to the particular sections of Chapter VI of the Indian Penal Code in respect of which proceedings are to be taken, and that the order or authority should be preceded by, and be the result of a deliberate determination that proceedings should be taken.

Per Stephen J.—Any act which tends to impede the course of justice is a contempt, if there is a well-proved probability of such being its result.

The law of contempt is applicable in India for the purpose of protecting witnesses, as it is applied in England to the protection of juries.

Contempt is to be treated as a crime, though it may not be one in India as it is in England.

Per Mookerjee J.—It is a matter of vital importance for the party against whom an order is sought, to know the person or persons at whose instance the application is made.

A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a civil contempt the proceeding for its punishment is at the instance of the party interested and is civil in its character; in the case of a criminal contempt, the proceeding is for punishment of an act committed against the majesty of the law, and as the primary purpose of the punishment is the vindication of the public authority, the proceedings conform as nearly as possible to proceedings in criminal cases. The dividing line between the acts constituting criminal and those constituting civil contempts may sometimes become indistinct in those cases where the two gradually merge into each other.

The course to be pursued in cases of contempt of Court by publication of an improper character made long before the proceedings have been brought to the Court, is to read the articles as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary.

On Motion made by the Advocate-General.

Rule calling upon Babu Motilal Ghose, Editor and Manager, and Tarit Kanti Biswas, Printer and Publisher of the *Amrita Bazar Patrika*, a newspaper published in Calcutta to show cause why they should not be committed to prison for their contempt of Court in respect of the printing and publication, on the 19th, 20th, 21st, 22nd, 24th, 26th and 30th days of May, 1913, of

Articles, which it was alleged tended or were calculated to interfere with the due course and administration of justice regarding the pending prosecution of *King-Emperor v. Girindra Mohan Das* and forty-three others in the Court of the District Magistrate of Barisal.

Mr. G. H. Kenrick, K. C. (Advocate-General) with *Mr. Buckland* for the Crown.

Mr. Jackson with *Messrs. St. John Stephen* and *K. N. Chaudhuri* for Babu Moti Lal Ghose.

Mr. B. Chackrabarti with *Messrs. B. K. Lahiri*, *C. C. Ghose* and *J. G. Ghose* for Tarit Kanti Biswas. C. A. V.

The judgments of the Court were as follows:

Jenkins C. J.—On the 12th May 1913, Mr. Lionel Hewitt Colson, special Superintendent Intelligence Branch, Criminal Investigation Department Indian Police Service, filed a petition of complaint in the Court of the Additional District Magistrate at Barisal, alleging that one Girindra Mohan Dass and 43 others had been guilty of offences under section 121A of the Indian Penal Code. The Magistrate, Mr. Nelson, examined the complainant on oath, recorded his deposition and directed certain warrants to issue. On the 19th, 20th, 21st, 22nd, 24th, 26th, and 30th days of May articles, it is said, containing comments on the criminal proceedings initiated by this complaint, described as the Barisal Conspiracy Case, were published in a newspaper called the *Amrita Bazar Patrika*. The Government of Bengal having been advised that the publication of these articles and each of them, and in particular the leading article of the 22nd May 1913, constituted serious contempt of Court, the Advocate-General on the 6th of June made an application to a Divisional Branch with a view to proceedings being taken against two persons on the ground that one of them was the Editor and Manager, and the other the printer and publisher of the *Amrita Bazar Patrika* newspaper.

The Advocate-General purported to apply on behalf of the officer of the Government of Bengal, whom he described as the Superintendent and Remembrancer of Legal Affairs and ex-officio Public Prosecutor, Bengal.

It appeared to the Division Bench that there might be a difficulty as to an application by the officer so described, and on this being brought to his notice, the Advocate-General stated to the Court that he was moving on behalf of His Excellency the Governor of Bengal in Council. Leave was accordingly given to the Advocate-General to move on behalf of the Governor of

CRIMINAL.

1913.

In the matter of
The Amrita Bazar
Patrika.

June, 30.

CRIMINAL.

1913.

In the matter of
The *Amrita Basar*
Patrika.

Jenkins, C. J.

Bengal in Council and not of the officer described as Legal Remembrancer. An order was accordingly drawn up in the following terms :—

"The Advocate-General of Bengal stating that he moves on behalf of His Excellency the Governor of Bengal in Council and at the instance of the Legal Remembrancer of Bengal, and that the matter is one of urgency, and further stating the facts on which he relies all of which will be supported by affidavits which he undertakes to file forthwith. It is ordered that, instead of issuing a rule, special leave be given to serve notice of motion of the application for Wednesday, the eleventh day of June, at eleven o'clock in the forenoon such notice to contain a general statement of the grounds. And it is further ordered that the said notice be forthwith served personally on Mutty Lal Ghose, the Editor and Manager, and on Tarini Kanta Biswas, the printer and publisher of the newspaper called the *Amrita Basar Patrika* together with a copy of the petition affidavits and exhibits and with a copy of this order."

A notice of motion was prepared on the same date whereby an order was sought that, "Moti Lal Ghose Editor and Manager and Tarini Kanta Biswas, printer and publisher of the *Amrita Basar Patrika* newspaper may be ordered to stand committed to prison for their contempt of Court in respect of printing and publication the articles which tend or are calculated to interfere with the due course and administration of justice."

The grounds are indicated at the foot of the notice of motion, and consist of a petition of the Superintendent and Remembrancer of Legal Affairs and three formal affidavits proving the presentation of the complaint, the purchase of the paper, and so forth. On the 11th of June, the day named for the hearing in the notice of motion, an adjournment became necessary as the notice had not been served on one of the respondents, and owing to his absence from Calcutta the motion could not be brought on till the 18th.

A contempt of Court of the class with which we are now concerned is a criminal offence and no person can be punished for it, unless that offence be proved by legal evidence: *In re Pollard* (1). I desire to make it clear at the outset that I propose only to deal with criminal and not with civil contempt.

The affidavits in this case show no connection between Babu Moti Lal Ghose and the impugned articles, and all that there is suggestive of this connection is a statement in the petition on

information and belief that he is the editor and manager. But a statement resting on information and belief is not legal evidence in a case like the present: *The Queen v. Stanger* (1). It was suggested by the Advocate-General that there was no denial by Babu Moti Lal Ghose, but, as pointed out in *The Queen v. Stanger* (1), and indeed is obvious, a man in a criminal proceedings need not deny that which is not legally proved against him. Even in a civil proceeding a statement on information and belief is not admissible except on an interlocutory application, and then the grounds of such belief must be stated. There certainly was no admission by Babu Moti Lal Ghose, for he had not time to file an affidavit by reason of the late service on him of the notice of motion and it was stated before us that he was actually in a position to deny the allegation. The materials, therefore, necessary to fasten responsibility on him were wholly wanting. The suggestion on the part of the Advocate-General that we should at that stage permit further affidavits or evidence was opposed to the conditions on which alone he obtained leave from the Division Bench to serve notice of motion, as well as to the rules of this Court. Realising his difficulty, the learned Council withdrew his motion as against Babu Moti Lal Ghose with the result that it had to be dismissed with costs.

The Advocate-General considered that his purpose would be sufficiently served if he could proceed against the printer and publisher, for he explained that there was no feeling against any particular individual and what was desired was to obtain a decision whether the proceedings of inferior Courts could be protected by this Court on a summary application. Had the case against the printer and publisher rested solely on the grounds furnished by those responsible for the motion it must equally have failed. But the application is saved from this by the second respondent's own admission, for, whatever may have been the view in days gone by, I think we can now take that admission into consideration though contained in the affidavit in answer to the motion.

So we proceeded with the case against the printer and publisher, and declined to grant the further adjournment for which that respondent prayed, for we felt that it was time the case should be heard and decided. The Advocate-General has contended that the articles justify the advice given to the

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

(1) (1871) L. R. 6 Q. B. 353; 40 L. J. Q. B. 91.

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

Government of Bengal and described in these words in the 7th paragraph of the petition "that these articles and each of them and in particular the leading article of the 22nd day of May 1913 in the circumstances aforesaid constitute a serious contempt of Court in that the several articles severally and in conjunction are calculated and tend to interfere with the due course and administration of justice and that in particular and without prejudice to the generality of the foregoing, the said leading article in the issue of the said newspaper dated the 22nd May 1913 tends to interfere with the course of justice by influencing the minds of persons who may be concerned in the said proceedings as Magistrates, assessors, jurors and witnesses." As a next step in his argument, the Advocate-General mentioned that the High Court had power to commit for the contempt of the Court of a Mofussil Magistrate.

Mr. Chakravarti for the printer and publisher accepted responsibility for the article as printer and publisher though his client, it is sworn, was not cognisant of them. He, however, repudiated the idea that the articles were intended to be or were a contempt of any Court; he questioned our jurisdiction to commit for contempt of an inferior Court; and drew our attention to a series of blunders in the procedure which, he claimed, vitiated the proceedings. There, undoubtedly, have been blunders which should not have found a place in so important an application. One has resulted in the dismissal of the motion with costs against one of the respondents at the very outset of the case. With that I have already dealt and I need not notice it further. That, on which reliance has principally been placed on behalf of the printer and publisher—whose name by the way has been incorrectly given—is that the notice of motion is expressed to be on behalf of the Superintendent and Remembrancer of Legal Affairs and ex-officio Public Prosecutor. This is contrary to the condition on which leave to serve notice of motion was given, and the irregularity is the less excusable because this matter was discussed and determined at the time, and our order of the 6th June expressly refers to and embodies the Advocate-General's statement that he moved on behalf of His Excellency the Governor of Bengal in Council. It was for such a motion and that alone that leave was granted. No leave was granted for the motion that has in fact been made. Nor is this all.

The Advocate-General in his opening has asked us to act

in the exercise of our common law powers in our original jurisdiction. This can only be on the Original Side of the Court and it has been brought to our notice that the officer described as the Legal Remembrancer is not authorised to represent the Government on the Original Side of the Court. More than that it has been contended that at the time when the Advocate-General obtained leave, his appearance before us was unauthorised as he was not instructed by an attorney and in fact the warrant of attorney was not filed until some days later.

The existence, too, of such an officer as "a Superintendent and Remembrancer of Legal Affairs and ex-officio, Public Prosecutor, Bengal", has been questioned and reference was made to Regulation IX of 1793 Regulation VIII of 1816 and Regulation XIII of 1829.

By way of reply, certain Government notifications were brought to our notice. But in the events that have happened it is unnecessary to pursue this topic further. Both sides being anxious to have a decision on the merits, we permitted an amendment that would regularize these proceedings and bring them into conformity with the order of the 6th of June.

The necessary authority for this has now been obtained and the required amendment will be treated as made, and as though His Excellency the Governor in Council were added as an applicant.

Have we the jurisdiction to commit for contempt of an inferior criminal Court? The question is one of considerable difficulty and cannot, as seemed to be supposed, be solved or even understood by a mere perusal of the decisions in *Surendra Nath Banerjee v. The Chief Justice and the Judges of the High Court, Calcutta* (1) and *Rex v. Davies* (2).

To determine the High Court's jurisdiction in this matter involves an enquiry into its constitution, and the jurisdiction power and authority: it has inherited, or may otherwise possess, though there was nothing in the argument in support of the motion to indicate that any consideration had been given to this aspect of the case.

By the Indian High Courts Act (24 and 25 Vict. c. 104), Her Majesty was empowered by Letters Patent to erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William. Sec. (1).

(1) (1888) I. L. B. 10 Cal. 109. (2) (1906) L. B. 1 K. B. 82.

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

CRIMINAL.

1913.

In the matter of
The Amrita Basar
Patrika.

Jenkins, O. J.

It was provided by section 8 that upon the establishment of such High Court, the Supreme Court and the Court of Sudder Dewani Adalat and Sudder Nizamat Adalat should be abolished, and that the records and documents of the several Courts so abolished should become and be records and documents of the High Court.

By section 9 it was enacted that: "The High Courts to be established under this Act should have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, Original and Appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as Her Majesty by Letters Patent grant and direct, subject, however, to such directions and limitations as to the exercise of Original, civil and criminal jurisdiction beyond the limits of the Presidency Town as might be prescribed thereby: and save as by such Letters Patent might be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts abolished under this Act at the time of the abolition of such last-mentioned Courts. Section 15 provided that the High Court should have superintendence over all Courts which might be subject to its appellate jurisdiction.

In 1862, the Letters Patent were granted and thereby Her Majesty did erect and establish a High Court at Fort William and constituted the same to be a Court of Record (clause 1).

By these Letters Patent, the High Court was vested with civil and criminal jurisdiction, both Original and Appellate. For the present purpose, it is only necessary to refer to clause 26 whereby it was ordained that the High Court should be a Court of appeal from the criminal Courts of the Bengal Division of the Presidency of Fort William and from all other Courts whether within or without the said Bengal Division from which there was then an appeal to the Court of the Sadar Nizamat Adalat and should exercise appellate jurisdiction in such cases as were subject to appeal to the said Court of Sadar Nizamat Adalat or should become subject to appeal to the High Court by virtue of such laws and regulations relating to criminal procedure as should be thereafter made by the Governor-General in Council,

Clause 27 provided for the hearing of referred cases and the revision of criminal trials.

By the Letters Patent of 28th December 1865 the Letters Patent of 1862 were revoked, but it was directed that notwithstanding such revocation, the High Court of Judicature should be and continue as from the time of the original erection and establishment thereof the High Court of Judicature at Fort William and should be and continue a Court of Record.

Clauses 27 and 28 empower the High Court to hear appeals from criminal Courts in the Provinces and also references and revisions of criminal trials.

Thus then the High Court inherited all jurisdiction and every power and authority in any manner vested in the Supreme Court, the Sadar Dewani Adalat, or the Sadar Nizamat Adalat.

The Supreme Court was established by Charter, dated the 26th March 1774, granted under 13 George III, c. 63 and it was thereby constituted a Court of Record (Clause 2).

By clause 4, it was ordained as follows: "And it is our further will and pleasure that the said Chief Justice and the said Puisne Justices, shall severally and respectively be and they are all and every of them hereby appointed to be Justices and Conservators of the Peace and Coroners, within and throughout the said Provinces, districts, and countries of Bengal, Behar, Orissa and every part thereof; and to have such jurisdiction and authority as our Justices of our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England by the Common Law thereof; and we further will and ordain that all judgments, rules, orders and acts of authority, or power whatsoever, to be made or done by the said Supreme Court of Judicature at Fort William in Bengal, shall be made or done by and with the concurrence of the said four Judges or so many or such one of them, as shall be on such occasions respectively assembled or sitting as a Court, or of the major-part of them so assembled and sitting; provided always, that in case they shall be equally divided, the Chief Justice or in his absence the senior Judge present shall have a double or casting voice."

By clause 21, the Court of Requests and Court of Quarter Sessions erected and established at Fort William and the Justices, Sheriffs and Magistrates appointed for the said districts were made subject to the order and control of the Supreme Court in such sort, manner and form as the inferior Courts and Magistrates

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

of and in England were, by law, subject to the order and control of the Court of King's Bench; and to that end the Supreme Court was empowered to issue writs and Mandamus, *Certiorari*, *Procedendo* or Error to be directed to such Courts or Magistrates as the case might require and to punish any contempt of a wilful disobedience thereunto by fine or imprisonment.

It is a sufficiently accurate statement for the purpose of this case to say, that, as the result of this and subsequent legislation, the criminal jurisdiction of the Supreme Court (apart from crimes maritime) was limited to the local limits except as to British subjects, and the Court had no general control or power over mofussil criminal Courts. The common law was similarly limited in its application to the Presidency towns and to British subjects outside the local limits.

The jurisdiction of the Sadar Dewani Adalat need not be considered. It is true that under 21 George III, c. 70, section 21, it was constituted a Court of Record, as the result, according to tradition, of insistence by the Chief Justice and Judges of the Supreme Court for a reason peculiar to their relations with the Sadar Dewani Adalat. But as its jurisdiction was civil, the powers inherited from this Court are of no assistance in this case. It only remains then to see what was the position of the Sadar Nizamat Adalat, or the final Court of criminal appeal from the mofussil. Its earlier history is set out in the preamble to Regulation IX of 1793. At that date, it consisted of the Governor-General and Members of the Supreme Council assisted by the head Kazee and two Mooftees.

By Regulation II of 1801, section 2 its constitution was altered and thenceforth the Court was to consist of three Judges.

In the course of time, the same Judges presided over the Sadar Nizamat Adalat and the Sadar Dewani Adalat, but the two Courts were distinct. I have been unable to discover any statute which made the Sadar Nizamat Adalat a Court of Record, nor can I find any indication that it was so regarded. Every Court of Record is the King's Court and all such Courts are created by an Act of Parliament, Letters Patent or prescription. (See Bacon's Abridgment, Vol. II 392, Stephen's Commentaries, Vol. III).

Not only then is there nothing to show that the Nizamat was created a Court of Record by Act of Parliament, Letters Patent or prescription, but it is not a King's Court, being only a Company's Court, and in theory derived its jurisdiction and

authority not from the British Crown, but from the country Government in whose name the Company acted (see Ilbert's Government of India, 1st Edition, p. 46).

But if it is not a Court of Record, then it is difficult to see what power it could have had to commit. *Mac'Dermott v. Judges of British Guiana* (1), *Kochappa v. Sachi Devi* (2).

This view is fully borne out by a circular order of the Sadar Nizamat of the 3rd of February 1848, to be found in the Collection of orders brought out by Mr. J. Curran. It appears from that order that it was brought to the notice of the Judicial authorities that Act XXX of 1841 was the only law under which contempt of Court could be punished.

Act XXX of 1841 is an Act for repressing obstructions to justice in certain Courts, of the East India Company, and by section 1 it is enacted that all persons using menacing gestures or expressions or otherwise obstructing justice in the presence of any zillah or city Magistrate, Joint Magistrate or other officer under a Magistrate empowered to try a civil case or any superior or inferior Court, civil or criminal, of the East India Company shall be liable to be fined by the authority whose proceedings are obstructed to any amount not exceeding Rs. 200, or in case such fine be not paid to be imprisoned for any period not exceeding one month. This was followed by a proviso that notwithstanding anything in the Act, it should be lawful to indict any person amenable to Her Majesty's Supreme Court, as for a misdemeanor in any of the cases aforesaid sustainable before this Act, if no proceeding shall have been had against the offender in the Court where the offence was committed but not otherwise. This then shows that the power to commit was only for contempt in the face of the Court, that the punishment was in the first instance fine, that the punishment was to be inflicted by the authority whose proceedings were obstructed, and that no power was vested in the Sadar Nizamat to punish for contempt of an inferior Court.

This then would seem to have been the position prior to the establishment of the High Court. The Supreme Court would have had no jurisdiction to protect a mofussil criminal Court by summary proceedings in a case like the present. The matter would have been only outside the authority of the Sadar Dewani Adalat. And though the Sadar Nizamat had a power

CRIMINAL.

1913.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

(1) (1888) L. R. 2 P. C. 841.

(2) (1909) 1. L. R. 26 Mad. 494.

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, O. J.

of superintendence over the mofussil criminal Court it had not any power to commit for contempt of these Courts.

If that be so, the jurisdiction now invoked cannot have been inherited from any of the three abolished Courts.

So it has to be seen whether it became vested in it by the Charter Act of 1861 or the Letters Patent under that Act.

So far as this Presidency is concerned the application is novel and the case is one of first impression.

It is argued however that the decision in *Rex v. Davies* (1) and a decision in *In re Venkat Rao* (2) but not elsewhere, are authorities on which we ought to act. This has been vigorously controverted by Mr. Chakravarti.

The King v. Davies (1) came before the King's Bench Division on a rule for a writ of attachment for contempt of Court. This contempt consisted in the publication of articles in a newspaper calculated to give an exceedingly unfavourable impression of a prisoner, who had been arrested and brought before the Magistrate. The publication was while the case was still before the Magistrate and prior to committal. It was held that the High Court had power to attach first because the case might come to the Assizes for trial, and secondly because, even if the committal had actually been made to the Quarter Sessions, still the King's Bench Division as the inheritor of all the jurisdiction and powers of the Court of King's Bench possessed this summary power of punishment.

It was on the 2nd of these two grounds that the Advocate-General relied in his opening.

This phase of *Rex v. Davies* (1) demands close attention in order to see whether it rests on reasoning which can legitimately be applied here. Certain links in that chain of reasoning are evident; others perhaps are not so clear.

First then the jurisdiction assumed to *Rex v. Davies* (1) was inherited, if at all from the old King's Bench and not from the other Courts of Record which became amalgamated in the English High Court, though those Courts too had the power to commit for contempt of themselves that belongs to every superior Court of Record.

Next this jurisdiction inherited from the old King's Bench was of a very special character, and, unless I have mis-read the judgment, it rested on that Court's power to punish every kind of misdemeanor, in that it was in a special manner, the guardian

(1) (1906) L. R. 1 K. B. 32.

(2) (1911) 21 M. L. J. 832.

and protector of public justice throughout the Kingdom, the *custos morum*, a dignity that reverted to it or was revived on the abolition of the Star Chamber by 16 Car. I. c. 10. Ordinarily misdemeanor was punishable by indictment on information, but when it was a contempt of Court it was also punishable *brevi manu* by attachment. When this summary proceeding was first used is in some doubt, but the opinion has been expressed that the earliest instance of its use where the contempt was an attack on a Judge not in the face of the Court, was in 1720.

The fact that there was an alternative mode of bringing the offender before the Court where the misdemeanor was a contempt of Court was merely a difference of procedure; the subject-matter was the same, that is to say, the prosecution of an offence in the Court of King's Bench. The helplessness of the inferior Court and its subjection to the superintendence and control of the King's Bench were not the foundation of the jurisdiction, but merely the occasion and the reason for its exercise.

This is made clear by the essential difference between the jurisdiction exercised by the Court of King's Bench and that exercised by the other superior Courts of record which possessed no relations with the inferior Courts, a difference that relates both to the formulation and object of the jurisdiction. But it is important here to note that the learned Judges seem to have thought that it would be within the jurisdiction of the King's Bench to punish as an offence any improper interference with the administration of justice in the superior Courts, and that the reason why the Court of King's Bench did not concern itself with contempt of the other superior Courts was that they possessed ample means and occasions for protecting themselves.

On these grounds the Court arrived at the conclusion that the proceeding before it was nothing more than the legitimate application to new circumstances of the old principles of the Common Law.

Those principles of the old common law must, I think, be that the Court of King's Bench as the *custos morum* had jurisdiction to punish on a summary proceeding as well as on indictment on information all offences in the Kingdom being a contempt of Court, as tending to interfere with the administration of justice. When the Court so impeded or embarrassed was an inferior criminal Court, unable to protect itself but under the superintendence and control of the Court of the King's Bench, the case was one in which it would be right that the common law principles would be applied on a summary proceeding.

ORIGINAL.

1913.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

ORIGINAL

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

Have we then these powers? Has this High Court common law powers that would enable it to punish as an offence in a summary proceeding conduct in relation to a proceeding in a mofussil criminal Court and not in the face of that Court, such conduct not being an offence under the Indian Penal Code, Act XLV of 1860. The preamble of this Act shows it was intended to be a general Penal Code for British India, but it contains no specific repeal of the Penal Laws then in force. This was intentional, as it was considered possible that some offences might have been omitted which it would not be intended to exempt from Penal consequences not only do the facts with which we are concerned not amount to an offence under any Act passed after the Indian Penal Code, but I cannot find that they would have been an offence under the criminal law in the mofussil prior to the Code. And here I may again refer to Act XXX of 1841.

It is conceivable that there might be facts which would constitute an offence in the nature of a contempt of an inferior Court within the limits of the High Court's original jurisdiction, as being a misdemeanor under the common law, and that it could be punished on a summary proceeding, but that would be of no help as I am now considering whether what has been done could be punished by the High Court on a summary proceeding as a contempt of a Magistrate's Court at Barisal.

I have already pointed out that by clause 21 of the charter of 1774, inferior criminal Courts and Magistrates were made subject to the order and control of the Supreme Court, "in such sort, manner, and form as the inferior Courts and Magistrates of and in England are by law subject to the order and control of our Court of King's Bench." And I would re-call that to this end the Supreme Court is expressly empowered and authorised only to award and issue a writ or writs of mandamus, *certiorari*, *procedendo* or error to be directed to such Courts or Magistrates as the case may require and to punish any contempt of a wilful disobedience thereunto by fine and imprisonment.

This is not without its bearing on the question whether it is open to this Court to adopt the extended application of common law principles sanctioned by *Rex v. Davies* (1).

The relations between the Supreme Court and the inferior Courts of the Presidency Town does not rest on the adoptable foundation of the common law, but on the Acts and Charter, and

it certainly is a question whether this Code, so constituted, did not crystallize these relations and the consequences to which they could give rise. And it may be that the authors of the charter did not anticipate the development expounded in *Rex v. Davies* (1), and they were lawyers of no slight eminence, for it is a matter of history that the original draft was perused by the Attorney-General, who afterwards became the Lord Chancellor, Lord Thurlow, was altered by the Solicitor-General, who afterwards became the Lord Chancellor, Lord Loughborough, and was revised by the Chief Justice of the Common Pleas, and by Earl Bathurst, then the Lord Chancellor of England. Its parentage therefore was above reproach.

But however that may be, the Courts and Magistrates which are indicated in clause 21 are those, not of the mofussil but of the Presidency Town, and I am not aware of any statutory jurisdiction possessed by the Supreme Court over Mofussil Magistrates except as provided in 53 George III, C. 155, or in relation to offences against them (if I may use that phrase) except to the extent indicated in Act XXX of 1841.

It is true that the High Court not only has superintendence over the Courts of Mofussil Magistrates but also is a Court of Record; if I am right however in my reading of *Rex v. Davies* (1), superintendence does not give jurisdiction while the power of the King's Bench to punish for interference with the lower Courts did not arise from its being a Court of Record but from its common law powers as *custos morum*.

I have studied as best as I could the decision reported as *In re Venkat Rao* (2). But to appreciate the *ratio decidendi* in that case, it would be necessary to possess an intimate acquaintance with the nature and limits of that Court's jurisdiction inherited from its predecessor or vested in it by its present charter. None of the materials necessary for this purpose have been placed before us, nor have I been able to discover how far the English common law prevails in that Presidency outside the Presidency Town. This limits the assistance I have been able to derive from this decision.

For the reasons I have expressed, I think the ground on which the Advocate-General founded his claim in his opening speech fails. And I may here point out that this would hardly have been a satisfactory basis for the jurisdiction invoked, as it would be of use only where the common law prevails. A

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

(1) (1906) L. R. 1 K. B. 32. (2) (1911) 21 M. L. J. 832.

CRIMINAL.

1918;

In the matter of
The Amrita Bazar
Patrika

Jenkins, O. J.

jurisdiction so founded would, as far as I can see, be of no use to the High Court of Allahabad, to any High Court established under the recent Act, or to any of the Chief Courts, but only to the three High Courts which are vested with common law powers.

But it was indicated to Mr. Chakrabarti by the Court in the course of his argument that we would desire him to consider whether this Court could not, as a Court of Record, commit for contempt on what I have already described as the first ground in *Rex v. Davies* (1), that is to say, on the ground that there was an independent contempt of this Court as distinct from the inferior Court inasmuch as the case might come before this Court either for original or appellate trial at one stage or another. In the ordinary course of Criminal Procedure, the case would not come before this Court for original trial, though it could by a disturbance of that ordinary course. It might be transferred here by an order of the High Court on special grounds, but there is nothing before us to show that they exist. It might also come before this Court under the Indian Criminal Law Amendment Act 1908, but this could only be, if it appeared to the Governor-General in Council or to the Local Government that in the interests of peace and good order the provisions of part I of the Act should be made to apply. Here again there is nothing before us to indicate that it does so appear to those authorities. For the purpose in hand, I think we should disregard remote possibilities and act upon the assumption that the normal procedure will be followed. And in support of this I may re-call the fact that though counsel in *Rex v. Davies* (1) relied on the possibility of removal of the case into the High Court by *certiorari*, it was apparently not regarded as deserving of notice in the judgment. I therefore put aside the contingency which, on the materials before us is remote, of the case coming before this Court on original trial.

But it may come before us on appeal either at the instance of any person convicted in the event of a conviction (Criminal Procedure Code, section 410), or conceivably though not probably at the instance of the Local Government in the event of an acquittal (section 417, Criminal Procedure Code). If the appeal were by the accused, the result of the trial would go to show that there had been no serious interference with the course of justice to the prejudice of the prosecution.

Now this Court is a Court of Record in all its jurisdictions, and it thus has power to commit for any contempt in relation to any of those jurisdictions: *In re Abdool* (1).

Thus I have no doubt that were there to be an interference with the due administration of justice by a Division Bench in relation to a criminal appeal pending before it and that interference amounted to an offence under the common law, this Court on its Crown side would have power to punish it as a contempt on a summary proceeding.

And I would go further and say that it might be cogently argued that there was the power even before the appeal was pending before this Court, but to avoid any possibility of misunderstanding, I again emphasise this would be on the ground that the contempt was of this Court and not of an inferior Court.

I have expressed myself thus guardedly as the matter is one of considerable difficulty and it has not been discussed in the course of the argument. It may be, if the matter ever comes up for consideration, that convincing objections could be urged against this more extended jurisdiction.

Nor can I overlook the fact that where a contempt in relation to an English county Court was under consideration it was said by Mellor, J. in *Queen v. Lefroy* (2), that what might be called contempt out of Court was left to be punished by the general law of the land by indictment or otherwise. In the same way, Cave J., delivering the judgment of the Court in *Queen v. Brompton County Court Judge* (3), expressed the view that contempt of a County Court Judge was punishable by indictment and not summarily. And though an appeal lay from the County Court to the High Court there was no suggestion that the High Court on that ground had power to punish summarily for contempt itself. I do not attach so much importance to the fact that no reference is made in *Rex v. Davies* (4), or *Rex v. Clarke* (5), to the fact, that the case might come before the High Court otherwise than on committal for trial, for that result would not be in the ordinary course. In saying this, I do not forget that *Rex v. Clarke* (5), was subsequent to the establishment of the new Court of criminal appeal, but it is to be noticed that this Court was established in 1907 as a distinct Court and though the presiding Judges are selected from the Judges of the King's Bench Division, it does not appear

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika,

Jenkins, O. J.

(1) (1867) 8 W. B. Cr. 82.

(2) (1878) L. R. 8 Q. B. 184.

(3) (1907) 2 Q. B. 195 (200).

(4) L. R. (1906) 1 K. B. 82.

(5) (1910) 108 L. T. 886.

ORIGINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, O. J.

clear that it is an integral part of the High Court. I feel the more justified in leaving this precise question open, for I am convinced that even if what I have described as the more extended jurisdiction in relation to contempt of this Court exists, no ground has here been shown for its exercise.

At the outset, it has to be borne in mind that what might have been a contempt of the inferior Court would by no means necessarily be a contempt of this Court. Thus, an attack upon the Magistrate, any endeavour to corrupt him, or any direct obstruction of his proceedings would not, speaking generally, be a contempt of this Court.

And the only way in which it could be contended in the circumstances of this case that there had been a contempt of this High Court, would be perhaps by showing that witnesses had been attacked, deterred and frightened, to use the language of Blackburn, J., in *Shipworth's case* (1), or in some manner dissuaded, hindered or prevented from giving evidence.

After careful and repeated consideration of the impugned articles, I come unhesitatingly to the conclusion that, whatever censure they may merit, they do not come under that particular censure.

The Advocate-General has taken us through the articles in minute detail and has presented to us with insistence that in some respects, their culpability could hardly be exceeded. He appears to me to have formed an exaggerated notion of their effect.

If the whole series of articles be read, it will, I think, be found that the more prominent topics are (1) remonstrance against universal house searches, (2) protests against the harsh treatment of those arrested, (3), deprecation of methods attributed to the police, (4) requests that the case should not be tried, before a special Magistrate and (5) an appeal to the recognised fairness of the Government, accompanied with some measure of advice. In the course of discussing these topics expressions are used here and there to which exception has been taken. No suspicion of contempt of this Court is to be found in the first, second and fifth of these topics even if there be involved in them what appeared to the Advocate-General to be the inexcusable presumption of offering advice to the higher authorities. The fourth topic, that is, the request that the accused should not be tried before a special Magistrate and the assertion that a

(1) (1878) L. B. 9 Q.B. 282.

*conviction by him would not command public confidence, show that the writer knew very little about what he was discussing, but this I believe sometimes happens even in journalism. He might as well have protested against trial by Court Martial. - The case could not be tried and the accused could not be convicted by a special Magistrate : Their trial in the normal course could only come before a Sessions Judge sitting with assessors, and against such a tribunal not a word has been said. Nor could the writer have possibly meant that the inquiry should not be before a Magistrate, as that is the only tribunal before which it could be held. But apart from all this, there is nothing in the discussion of this topic that is in any degree a contempt to this Court.

There only remains the third topic, the deprecation of methods attributed to the police. It is no part of our duty to reprehend that which cannot properly be the subject to legal censure. Still, though perhaps the remark may not be strictly relevant, I do strongly feel that indiscriminate attacks on this force themselves to be deprecated. - Where the definite misdoing is established, by all means condemn with all emphasis the misdoer and his misdeed. But general abuse merely defeats its own end, for it is the tendency of men to become what they are depicted.

No doubt a distrust of the police is expressed, but however undeserved it may be, it is, I think, too sensitive a mind which would perceive in the article a contempt of this Court. There is no denial of guilt ; on the contrary the wish is expressed that the guilty should be arrested and punished. And I am unable to hold that witnesses would be deterred from giving evidence by reason of this attack on police methods, or of anything contained in the articles. I have examined and re-examined the articles to see if they could reasonably produce this consequence, but I come without doubt to the conclusion that they could not. And indeed this, for obvious reasons, was not the principal attack made on them in argument.

I purposely refrain from quoting the articles, or extracts from them, at length, for it would serve no useful purpose, but there are one or two passages to which I must refer because they have been made the subject of special animadversion by the Advocate-General. In the article of the 22nd of May there is the following passage. "Why should the defendants in the present case at least such of them against whom there is no positive evidence, be handcuffed or refused bail, and made to rot in Jail

ORIGINAL

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

before they have been found guilty." Here, it is said, is an assertion that against some of the accused there is absolutely no evidence.

To begin with, that is not what was written; there is a surmise that there may be some accused against whom there is not positive evidence. The Advocate-General repudiated the idea that the word "positive" could qualify or really narrow the character of the evidence. I was surprised at this suggestion, and I find I was fully justified in such surprise, for there is very high authority for the view that "positive evidence" has a recognised and distinct signification and that it means evidence "which goes expressly to the very point in question; and that which, if believed, proves the point without aid from inference or reasoning as the testimony of an eye-witness to an occurrence as distinguished from indirect or circumstantial evidence." The surmise therefore has not the sinister meaning ascribed to it; and moreover some regard must be had to the obvious purpose of the sentence, and to the topic of which it forms a part. It is not suggested that in no case should the accused be put on their trial; on the contrary, it is expressly said that if His Excellency is convinced that a *prima facie* case has been made out, the accused must stand their trial. The suggestion as to His Excellency is condemned, but after all this is substantially only what the law provides, for a Court cannot take cognisance of any offence punishable under Chapter VI of the Indian Penal Code unless upon complaint made by order, of or under the authority from (amongst others) the Local Government, or in other words, the Governor in Council (Criminal Procedure Code Section 196). It need hardly be said that the Governor in Council would not make this order or grant this authority unless he had reason to believe that a *prima facie* case had been made out.

And I would here repeat what I have said before, that it appears to me to be the true implication of section 196 that the judgment of the Local Government should be specially directed to the particular sections of Chapter VI, in respect of which proceedings are to be taken, and that the order or authority should be preceded by, and be the result of a deliberate determination that proceedings should be taken.

The conclusion then to which I come is that though we may have jurisdiction to commit for contempt of the High Court in a case of this class, still that in the present case no contempt justifying summary action on our part has been established.

As the contempt of inferior Courts has been so much under discussion in this case, I would take this opportunity of urging, as earnestly as I can, the propriety of abstaining from comment on pending cases in whatever Court they may be, or whatever stage they may have reached. The responsibility of a Judicial Tribunal is at all times great, and I do not think I ask too much when I ask in the interests of judicial officers working in the mufussil Districts of this Presidency, that the weight of that responsibility should not run the risk of being increased, however unwittingly, by comments on the cases before them, or on themselves in connection with those cases. I am tempted here to quote the words of Blackburn J. in *Skipworth's* case (1) where he said: "It is not right that a Judge * * * when personal attacks are made on him, should come forward and meet them and explain them, and that is well-known to those who make the attack, and certainly that knowledge does in my mind render the conduct of those who attack a Judge in that way, to use the mildest term, neither just nor decorous." The learned Judge was speaking of those who could in some measure protect themselves: how much more forcibly do his words apply to those who have not that power.

Then this motion raises question of high importance which it would not be right for me to pass by without remark. I allude to the question what circumstances ordinarily justify recourse to this summary process of contempt.

It is not enough that there should be a technical contempt of Court: it must be shown that it was probable the publication would substantially interfere with the due administration of justice.

And there is good reason for this: what is charged is a criminal offence and the trial is not in accordance with those safe guards that the ordinary procedure for the trial of a criminal offence requires, but by way of summary proceedings. Lindley, J. declared, in *O'Shea v. O'Shea* (2) that this was the only offence of which he knew that was punishable at common law by summary process.

It is therefore no matter for surprise that the cases are full of warnings that this arbitrary, unlimited, and uncontrolled power should be exercised with the greatest caution: that this power merits this description will be realised when it is understood that there is no limit to the imprisonment that may be

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika,

Johnson, C. J.

(1) (1873) L. R. 9 Q. B. 237.

(2) (1890) L. R. 15 P. D. 64.

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

inflicted, or the fine that may be imposed save the Court's unfettered discretion, and that the subject is protected by no right of general appeal.

Thus we find Lord Morris in delivering the judgment of the Privy Council in *McLeod v. St Aubyn* (1) describing committal for contempt of Court as a weapon to be used sparingly and always with reference to the interests of the administration of justice. This is an authority that must command our respect. But it does not stand alone. In *Plating Co. v. Farquharson* (2) Jessel M. R. after saying that the practice of making these motions against innocent people ought to be discouraged as far as possible, added: "They lead to great waste of time and to a considerable amount of costs, and unless the court is satisfied that the publication is a contempt which interferes with the courts of justice, the court ought not to interfere;" While James, L. J. said of the motion made against the proprietors of the newspaper, who inserted an advertisement in the ordinary course of business, that it seemed to him to be idle and extravagant and a thing to be strongly discouraged. And later he says "I think these motions are a contempt of Court in themselves, because they tend to waste the public time."

In *Rex v. Gray* (3) Lord Chief Justice Russell spoke of this jurisdiction as one to be exercised with scrupulous care and to be exercised only when the case is clear and beyond reasonable doubt.

Other opinions to the same effect might be multiplied, but these will suffice as an indication of the care and reserve with which these applications should be made. I will therefore limit myself to the citation of two cases which give an instructive illustration of the application of these principles. In *Rex v. Doolen* (4), proceedings were taken against Mr. Walter Long for a speech delivered by him commenting on a criminal case, and against others as connected with newspapers which published the speech.

This speech was an adverse comment on the failure of a jury to convict made at a time when there was the prospect of a new trial.

It was said that language had been employed, the use of which was much to be deprecated, and the speech was described by one of the learned Judges as capable of having the effect of

(1) L. R. (1899) A. C. 549.

(3) (1900) 2 Q. B. 86.

(2) (1881) L. R. 17 Ch. D. 49.

(4) (1907) J. B. 260.

prejudicing the trial, so that it appeared to him that in that sense it constituted a contempt, but he goes on to ask : Is the contempt of so serious a character as in the circumstances described to call for the exercise of the very special and summary jurisdiction vested in the Court ? His answer was in the negative, and in arriving at this conclusion, the learned Judge explained that he was influenced by the leaning of the Courts in the more recent cases of alleged contempt to discourage applications where, notwithstanding the *prima facie* tendency of the language, there was no real prejudice created or no real case made for the interference of the Court. The Judgment of the Lord Chief Justice is particularly instructive. He points out that for the purpose in hand, there is no difference in principles between a prosecution and an action, and further that there is nothing more calculated to defeat the ostensible object of the motion than the motion itself.

Then after discussing the facts he observes, "what does this all amount to ? A possibility upon a possibility, a remote contingency upon a very remote contingency. We must look at the realities of things."

The learned Lord Chief Justice then cites the case of the Evening Standard which was described by Darling J., as one of extraordinary indiscretion and impropriety showing a very slight regard for the administration of justice by the Courts of the King, yet upon the ground that he could not say it was really calculated to prevent a fair trial, he thought there should be no rule granted. Phillimore J. expressed his agreement and said he was very glad to have that opportunity of saying what he had to say, and what he had said before and what he said every time that the world had gone mad on the doctrine of contempt of Court and that the doctrine ought not to be extended. None of these important cases were in the first instance cited to us by Counsel for the motion : even *Rex v. Doolen* (1) had to be brought to his notice. They expound in the clearest terms the caution and reserve with which proceedings such as the present should be initiated, and no Court in the due discharge of its duty can afford to disregard them.

This motion against T. K. Biswas has wholly failed and (in my opinion), it must be dismissed with cost.

This respondent has been brought before the Court at considerable costs to himself, and the usual rule, when a motion

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Jenkins, C. J.

(1) (1907) 1, B. 260.

CRIMINAL.

1918.

In the matter of
The Ananta Hazar
Patrika.

Jenkins, C. J.

for contempt is dismissed, is that the respondent's costs should be paid. In this case I think it would be but right that the respondent should receive his costs, and that, to ascertain them, they should (if necessary) be taxed as between party and party as though on a hearing on the Original Side.

The order for costs will, as a matter of form, be against the Legal Remembrancer, the sole applicant on the record until the close of the case—no costs were incurred after the amendment of the record by the addition of the Government.

But doubtless the Government will defray the costs that thus fall on their officer.

Stephen, J.—This matter comes before us on a motion by the Advocate-General, as to the framing of which I have nothing to add to what has fallen from the Chief Justice.

The substantial questions that we have to decide are whether the publications complained of constitute a contempt of Court, whether we have power to commit the respondent for having printed and published them, and whether we ought to do so. Dividing the law from the fact, the questions become *first*, what jurisdictions have we to deal with this matter *secondly*, has the respondent been guilty of contempt?

On the first point, the facts are of the simplest, and not in dispute. The respondent printed and published in Calcutta comments on events connected with a charge that had then been made against a number of persons of an offence under section 121A of the Penal Code. The offence was said to have been committed in Barisal and at the time of the publication complained of, warrants had been issued for the arrest of persons against whom complaint had been made, and it appears that some of them at least had been arrested. Under these circumstances, supposing the comments in question to be contumacious, what powers have we to deal with them summarily? The power must in any case have its origin in the common law of England, and before we can exercise it, it is necessary to see whether it has been conferred on us. Since the decision in *Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court, Calcutta* (1), there is no doubt but that we have such a power in cases of contempts of this Court committed in Calcutta, derived from 13 George III c. 63 and the High Courts Act 1861 (24 and 25 Victoria c. 104) section 9. But here, though the contempt takes place in Calcutta it is in the first place a

(1) (1888) 1, L. R. 10 Calo. 109.

contempt of another Court : and under what enactment or under what general principle of law can we take on ourselves to act in such a matter ? It seems to me that there are four ways in which such a power can have been conferred on us. *First*, the power may have been possessed by one of the Courts abolished and superseded by us in 1864 and we may have derived it from such Court, although by inheritance, under clause 9 of our Charter. *Secondly*, the power may have been conferred on us or them directly by legislation. *Thirdly*, as we have a power of superintendence over the inferior criminal Courts, we may have a corresponding power of protection. *Fourthly*, it may be that as appellate powers have been conferred on us as a Court, any act that tends to impede the course of justice in a Court from whose decision there is an appeal to us, and in particular any act that tends to prevent evidence being given there, or to taint such evidence, is a contempt of this Court.

To the supposition that we have inherited any power of commitment innate in any of the previously existing Courts, an objection which seems to me insuperable suggests itself at the outset. Under the High Courts Act, we inherit the powers vested in the Sudder Dewani Adalat and the Sudder Nizamat Adalat, which divided between them what are now our appellate powers of criminal and civil jurisdiction respectively. Any power to deal with contempts, in criminal cases in *mofussil* that we may have inherited, we must therefore have inherited from the Sudder Nizamat Adalat, and there is nothing to show that that Court was ever a Court of Record, a characteristic which is a qualification to the exercise of any power to commit. The Sudder Dewani Adalat became a Court of Record by the East India Company Act of 1780 (2 George III, c. 70) but it was not till 1793 that the new Sudder Courts were connected by the Judges of one being the same as the Judges of the other, and the difference between the two lasted till the end. If it is argued that as a Court of Record we supply the one thing lacking to the Sudder Nizamat necessary to qualify it to commit, this takes the question out of the realm of inheritance and anticipates arguments that must be noticed hereafter.

If we have not inherited the power, has it been conferred on us by direct legislation ? For myself, I can only say that our attention has not been drawn to any such legislation and that examination of such Acts and Regulations as would be most likely to confer it, if it has been conferred, has not guided

CRIMINAL

1918.

In the matter of
The Amrita Bazar
Patrika.

Stephen, J.

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Stephen, J.

me to any. It is true that by their Original Patent of 1774, the Chief Justice and Puisne Judges, our predecessors in the Supreme Court, had such jurisdiction and authority throughout Bengal as Justices of the Kings Bench had in England. But this seems not to confer any power on the Court, as distinguished from its members, and it is not suggested now that we have outside the scope of our original jurisdiction, any such general power of correcting what is wrong with the administration of justice, as from a very early date has been attributed to the King's Bench in England, and is recognised in *Rex v. Davies* (1) by describing it as *custos morum*. Indeed when power was given to Justices of the Peace and zillah Courts to try British subjects in the mofussil, it was considered necessary to give a power of proceedings *certiorari* limited to much narrower bounds than that possessed by the King's Bench.

In the early days of the Supreme Court those whom we may regard as our predecessors-in-office encountered several difficult passages before the limits of their jurisdiction were finally recognised. I do not understand that the Advocate-General wishes to revive the questions that were once so agitating by assuming a position which on merely historical grounds is perhaps more ours than his. But for myself, I cannot help feeling that a truce of 150 years has some significance, and since, as far as appears, we have not in our original jurisdiction exercised any powers under the common law outside our local jurisdiction during, say the nineteenth century, I feel a reluctance to attempt to do so now. If we derive no rights for the present purpose from the Charter of 1774, still less do we derive them from any provision under the present Charter, sitting as we are in our original criminal jurisdiction; for it is not suggested that that jurisdiction has been in any way extended.

The next point is that as we have a power of superintendence over the inferior Courts, so we have also a power to protect them from improper interference. The argument is an attractive one because, as is said by Wills, J, in *Rex v. Parke* (2). "It would seem almost a natural corollary" that a Court, which controls an inferior Court should have power to protect it from unlawful attacks, and interferences with their independence: but the decision of the point is purposely avoided. In *Rex v. Davies* (1) however, the Court definitely took on itself the duty of protecting an inferior Court from improper interference in a

(1) (1906) 1 K. B. 82.

(2) (1908) 1 K. B. 442.

case which it treated as being one that could not in the ordinary course come before it. But after a careful study of the case I am unable to read it as saying that control or superintendence necessarily implies a power to protect. The reasoning on which the decision depends is, as I apprehend it, that the King's Bench controls inferior Courts, being "in a special manner the guardian and protector of public justice throughout the kingdom"; it is almost suggested that it might protect a Court of equal authority, as the Court of Chancery, and only does not do so because they can protect themselves. The power of publishing contempt is not so much to protect the Court or individual Judges from a repetition of offences against them, as to protect the public "specially these who are either voluntarily or by compulsion subject to (the Court's) jurisdiction from the mischief they will incur if the authority, of the tribunal be condemned or impaired." To limit the power of commitment to attacks on the committing Court would be to act on the wrong principle that the "offended dignity" of a Court is the subject of punishment. If an unimpeded course of justice is to be secured to inferior Courts, it must be done by the King's Bench and "if it be true that the King's Bench is in any way the *custos morum* of the Kingdom, it must be its function to apply with the necessary adaptations, to the altered circumstances of the present day, the same great principles that it has always upheld." The Court accordingly held that it could protect an inferior Court in the trial of a case that could never in ordinary course come before the King's Bench. The decision is admittedly a new departure in the sense that it applies an old principle to circumstances that are, for reasons given, such as have not risen before. But I cannot read the decision otherwise than as depending on general powers possessed by the King's Bench to secure a proper administration of justice to His Majesty's subjects, which I cannot find to have been conferred on us. It is therefore impossible to hold that our powers of superintendence imply any power of protection.

In the last place, if the case that being investigated at Barisal when the comments we have to consider were published should result in a trial and a judgment, that judgment may very well come before us on appeal in the ordinary course. That appeal will be tried in this Court on the evidence given in the Court at Barisal. As a matter of principle it seems to me undeniable that we have a right to treat as a contempt any act committed within the local limits of our original jurisdiction that

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Stephen, J.

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Stephen, J.

may affect its trial on appeal; and in particular any act that may tend either to taint or impair that evidence or to cause evidence that would otherwise be forthcoming to be withheld. I do not mean to say that this indicates the limits of our jurisdiction, but in this case the acts complained of, namely, printing and publishing, were committed in Calcutta and on the facts of the case, I do not think that the contempt alleged need be considered from any point of view except the effect that it may have on the evidence to be given at Barisal. There is no authority on the subject, because till the establishment of the Court of criminal appeal in England in 1907 (after *Rex v. Davies* (1) had been decided), there was no appellate Court in a position similar to ours and it is, therefore, enough for me to state my opinion without amplifying it.

Turning now to the comments complained of, I will first consider what their effect really is, and then whether they constitute a contempt that we ought to punish summarily bearing in mind that we have to consider the matter only from the point of view of our appellate Court. The comments were published on the 19th, 20th, 21st, 22nd, 24th, 26th and 30th of May, so that one may fairly be used to indicate the meaning of another, and with them must be considered an article of the 20th May put in by the respondent.

It is not necessary to consider the publications complained of in great detail, and it is not easy or perhaps possible to summarise them fairly. I will, therefore, only say that they seem to me certainly to contain allegations, or at least suggestions, that the police are collecting evidence unfairly and harshly, and may be expected to contrive to bring forward a false case which they have opportunities for doing. Arrests are being made with unusual harshness; if the case is tried before a special Magistrate the police will have it all their own way; the case should be tried before a so-called Special Tribunal. These allegations, repeated with details, which need not be considered and with various florid turns of speech from the staple of the publications complained of.

The conclusion that I draw from a careful and repeated examination of the publications placed before us, is that the writer in the first place wishes to attack the Police and Executive rather than the Judicial Authorities, and to lay a foundation for saying that any convictions that may take place have been

(1) (1906) 1 K. B. 83.

obtained by improper means. He is ignorant of the procedure which will be followed, he misnames the trying Court, though I do not think he can be heard to say that when he speaks of a special Magistrate he does not mean a Sessions Judge, and his impressions as to the effect of the Criminal Law Amendment Act, 1900, and the Conspiracy Act 1912 are erroneous. He writes recklessly, and in addressing readers more ignorant than himself misrepresents the law. I consider that he is ready to use any possible argument for effecting his purposes.

For our immediate purposes I need not consider any other aspect of this conduct than its effect on the hearing of a possible appeal. And I can come to no other conclusion than that this will probably be negligible. The case will not be tried before a Jury. The writer may in the words of Lord Alverstone in *R. v. Tibbett* (1), "produce an atmosphere of suspicion in the midst of which the proceedings—that is the trial—will go on." He may thereby make the duty of the Sessions Judge more difficult than it otherwise would be, but he will not affect the Court of Appeal. Besides he is writing long before the trial, and the danger to be apprehended in *R. v. Tibbetts* (1), that the jury will have knowledge of facts that they ought not to have, is not present in this case. Most of the English cases relating to this kind of contempt have in view this particular danger namely, that a jury may be unduly influenced. This does not apply here. But there is indeed a danger that does not exist to the same extent in England. Witnesses are more easily influenced here than they are there and writing such as we have before us may have the effect of deterring them from giving evidence which in the interests of justice should be given. For my part I should be willing to apply the law of contempt in India to the purpose of protecting witnesses, as it is applied in England to the protection of juries; a course which is fully justified by numerous authorities. But in the present case, I cannot consider that there is sufficient probability of witnesses being improperly influenced to justify us in committing the respondent.

There is good authority for saying that we are to consider the effects of the respondent's action rather than his intentions. But contempt is to be treated as a crime, though it may not be one in India as it is England, and we do not need the abundant authority that there is on the point to say that before we commit for a contempt of this character, it must be clearly made out

(1) (1902) 1 K. B. 77.

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Stephen, J.

ORIGINAL

1918.

In the matter of
The *Amrita Bazar*
Patrika.

Stephen. J.

that the course of justice may really be impeded. In the present case, this, in my opinion, has not been done.

On this view of the facts of the case, this motion must fail even though the law of contempt is stated in the modest terms applicable to the present case, and I do not think it is necessary to say more on the question of what constitutes a contempt than any act which tends to impede the course of justice is a contempt, if there is a well proved probability of such being its result. As this test is not fulfilled in the present case, I do not consider it necessary to inquire in further detail into this part of the question.

In conclusion, I cannot refrain from saying that though I cannot hold that the conduct of the respondent amounts to a contempt, a very slight alteration in the facts of the case might produce an opposite result. The law on the subject in England is from some point of view ill defined, In India, owing to the course that legislation has followed, it is much more so. What is certain is in the words of Wilmut, C. J. that a Court of justice without power to vindicate its authority, to enforce obedience to its mandates, or to shield those who are entrusted to its care, is an anomaly that ought not to be permitted to exist in any civilised community; and the Courts will, no doubt be anxious to correct any such anomaly, if it exists, as far as lies in their power.

I concur with the order suggested by the Chief Justice.

Mookerjee, J.—The Court is invited upon this application to order that Motilal Ghose, Editor and Manager, and Taritkanta Biswas, Printer and Publisher of the *Amrita Bazar Patrika*, a newspaper published in this city, do stand committed to prison for their contempt of Court in respect of the printing and publication, on the 19th, 20th, 21st, 22nd, 24th, 26th and 30th days of May, 1913, of Articles which it is alleged tend or are calculated to interfere with the due course and administration of justice regarding the pending prosecution of *King-Emperor v. Girindra Mohan Das* and forty-three others in the Court of the District Magistrate of Barisal. In so far as the alleged editor and manager is concerned, the application has already been refused with costs, on the ground that the affidavits are wholly insufficient and there are no materials on the record upon which the Court can, on well recognised principles, be invited to take any action. [*R. v. Stranger* (1) and *Gobinda Mohan v. Kunja Behari* (2).] No further reference will consequently be made in

(1) (1871) L. R. 6 Q. B. 852 (2) (1909) 10 O. L. J. 414.

so far as the alleged editor and manager is concerned. In respect of the application against the printer and publisher, the case has been elaborately argued on both sides, and the following points emerge for the consideration of the Court, namely, *first*, is there a proper application upon which the Court can be invited to proceed against the printer and publisher; *secondly*, if it be assumed that the articles mentioned constitute a contempt of the Court of the Magistrate of Barisal has this Court jurisdiction to punish the printer and publisher for such contempt, and, *thirdly*, if this Court has no jurisdiction to punish for contempt of a subordinate Court, do these articles constitute a contempt of this Court, so as to render the printer and publisher liable to be punished for such contempt.

In so far as the first of these questions is concerned, it is necessary to state that when the application was made on the 6th June, last, it was observed by the Court that it purported, on the face of it, to be made by the Superintendent and Remembrancer of Legal affairs and Ex-officio Public Prosecutor. The Court declined to entertain the application, till it was stated by the Advocate-General that he moved on behalf of His Excellency the Governor of Bengal in Council. Special leave was thereupon granted to the Advocate-General to serve notice of motion upon the two persons against whom the application was made. Notice was subsequently served, as well upon the alleged editor and manager as upon the printer and publisher. The application, however, it was transpired at the hearing, was not amended, and even after special leave had been granted to the Advocate-General to move on behalf of His Excellency the Governor of Bengal in Council, the application stood as if it was made by the Superintendent and Remembrancer of Legal affairs and the notice of motion ran in the same terms. Under these circumstances, the printer and publisher has urged that there is no proper application before the Court. This contention is manifestly well-founded. It has been argued that the office of Legal Remembrancer, mentioned in Regulation IX of 1793 and formally created by Regulation VIII of 1816 was abolished by Regulation XIII of 1829, and the repeal of the Regulation last mentioned by Act VIII of 1868 did not operate to revive the office as a statutory office. To this argument, no serious answer has been attempted on behalf of the Crown, but it has been stated that by Resolution of Government in 1845, the office was revived and has since then been continued. It

CRIMINAL.

1913.

In the matter of
The Amrita Bazar
Patrika.

Nookerjee, J.

CRIMINAL

1913.

In the matter of
The Amrita Bazar
Patrika.

Mookerjee, J.

has also been stated that the Legal Remembrancer is, by executive order, Judicial Secretary to the Government and Ex-officio public prosecutor for the Presidency of Bengal. This is obviously immaterial for our present purposes. Leave was explicitly granted to the Advocate-General to move on behalf of His Excellency the Governor in Council on the faith of the assurance that the application had been authorised by the Governor in Council. The application ought to have been drawn up accordingly, and notice of motion served in strict conformity therewith. It is indisputable that this has not been done. The Legal Remembrancer is not shown to be competent to appear and act on behalf of the Crown on the Crown Side of this Court; yet, as transpired at the hearing, no power of attorney had been filed till three days after leave to serve notice had been obtained from this Court. It would be a mistake to suppose that this is a mere matter of form; it is plainly a matter of vital importance for the party against whom the order is sought, to know the person or persons at whose instance the application is made; if the application is refused, he is entitled to know who is responsible for his costs; if on the other hand, the application is successful, he is entitled to know who is the respondent in a possible appeal by him. In view of these circumstances, and also in view of the fact that the proceeding is in the nature of a criminal proceeding, the Court is bound to insist that the application on behalf of the Crown should be made with some approach to regularity and accuracy. The Advocate-General has consequently been constrained, at the close of the arguments which lasted for four days, to apply for leave to amend the petition on behalf of the Crown. In the circumstances of this case, the Court decided to grant leave to amend. This is in conformity with the decision of Chitty, J. in *Callow v. Young* (1). In that case, the learned Judge stated that he would be very slow to give leave to amend the notice of motion, if it were in any way likely that by so doing an injustice would be done to any party; he therefore gave leave to amend the notice of motion, but directed the motion to stand over so that notice might be served again (see also *Buist v. Bridge* (2)). Since leave to amend was granted, a certificate has been produced from the Chief Secretary to the Government of Bengal to the effect that the application had been authorised by His Excellency the Governor of Bengal in Council and the petition will be amended

(1) (1877) 53 L. J. Ch. 69. (2) (1880) 48 L. T. 483.

accordingly by the addition of the Governor in Council as petitioner. The application may consequently be now deemed to be in order.

In so far as the second question is concerned, it has been contended on behalf of the printer and publisher that even if it be assumed for a moment,—for the purposes of argument,—and for that purpose only,—that the articles mentioned constitute a contempt of the Court of the Magistrate of Barisal, yet the High Court has no jurisdiction to punish him for the alleged contempt. This has been controverted on behalf of the Crown, and reliance has been placed upon the decisions in *Surendra Nath Banerjee v. Chief Justice of Bengal* (1), *R. v. Davies* (2) and *In re Venkat Rao* (3). The question raised is one of great importance, and its determination is by no means free from difficulty the gravity of which has not even been realised by the Advocate-General who appeared on behalf of the Crown. For the solution of the problem, we must turn in the first place to the Indian High Courts Act (24 and 25 Vict. Ch. 104) and Letters Patent dated the 14th May 1862 by which this Court was constituted. Section 9 of the Indian High Courts Act, which defines the jurisdiction and powers of the Indian High Courts, provides as follows :

“Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of Justice in the Presidency for which it is established, as Her Majesty may, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil, and criminal jurisdiction beyond the limits of the Presidency town as may be prescribed thereby ; and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the Legislative Powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same presidency abolished under this Act at the time of the abolition of such last mentioned Courts.”

The Courts which were abolished upon the establishment of

CRIMINAL

1918.

In the matter of
The Amrita Bazar
Patrika.

Mookenjee, J.

(1) (1833) 1 L. B. 10 Calo. 109.

(2) (1906) 1 K. B. 31.

(3) (1911) 21 M. L. J. 882.

CRIMINAL.

1913.

In the matter of
The Amrita Bazar
Patrika.

Mookerjee J.

this High Court are specified in section 8, namely, the Supreme Court and the Courts named Sadar Dewani Adalat and Sadar Nizamat Adalat at Calcutta. Consequently, the fundamental question which requires examination is, whether in a matter of the description now before us, any of the abolished Courts had jurisdiction, power or authority to make the order which this Court is now invited by the Crown to pass. Now, in so far as the Supreme Court of Calcutta is concerned, it is manifest from an examination of Statute 13 Geo. 3 Chap. 63 and the Charter of the 26th March 1774 by which the Supreme Court was established, that the Supreme Court, if it existed now, would have had no jurisdiction to punish the printer and publisher before us for contempt of a Court situated beyond the territorial limits of Calcutta. A criminal Court at Barisal would in no way be subject to the authority of the Supreme Court, as is plain from clause 21 of the Charter of 1774, and even if it were assumed that the Supreme Court, constituted a Court of Record by clause 2 of the Charter and invested with the powers of the Court of King's Bench by clause 4, had inherent authority to punish a contempt of a subordinate Court, it would not follow that the Supreme Court could punish for contempt of a Court not subordinate to its authority. In so far as the Court of Sadar Dewani Adalat of Calcutta is concerned, it was no doubt a Court of Record, and its establishment had been authorised by a statute of Parliament (21 Geo. 3 Chap. 70, sec. 71). But the Sadar Dewani Adalat, as its name implies had no jurisdiction in criminal matters, and if the case now before us had happened in 1862, before the abolition of the Sadar Dewani Adalat, it could not have been suggested with any approach to plausibility that the Sadar Court could have punished a contempt of a criminal Court at Barisal. Consequently, the only other abolished Court whose jurisdiction, power or authority we have to consider is the Sadar Nizamat Adalat. The history of the establishment and development of the Sadar Nizamat Adalat has been investigated by authoritative writers, amongst whom may be mentioned Harington (*Analysis of Bengal Regulations*), Auber (*Rise and Progress of the British Power in India*), Beaufort (*Digest of Criminal Law*), Cowell (*History and Constitution of Indian Courts*) and Field (*Introduction to the Bengal Regulations*). The details of this history need not be set out here for our present purposes, but it will be found outlined in the first section of Regulation IX of 1793. From an examination of this history,

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.Mockerjee, J.

two points appear to be indisputable, namely, *first*, that the Sadar Nizamat Adalat was not a King's Court but the Company's Court, and, *secondly*, that the Sadar Nizamat Adalat was not a Court of Record, though it had power of superintendence over subordinate criminal Courts (Regulation IX of 1807, section 24). Consequently, even if it be assumed for a moment that a Court of Record has power to punish for contempt of a subordinate Court, it is plain that the Sadar Nizamat Adalat would have had no authority, if the case before us had happened while that Court was still in existence, to punish for contempt of a subordinate Court at Barisal. I have searched in vain for a single instance of the exercise of power by the Sadar Nizamat Adalat to punish for contempt of a subordinate criminal Court; the published reports and the constructions issued from time to time, do not furnish any indication that such a power was ever claimed or exercised. On the other hand, statutory provisions completely negative any possible theory that the Sadar Nizamat Adalat had inherent jurisdiction to punish for contempts of subordinate criminal Courts. Reference may in this connection be made to section 22 of Regulation III of 1803 which made a provision for punishment of contempt of Court in open court. An examination of Regulation XII of 1825, which was passed avowedly for the uniform punishment of contempts of court in any of the Courts of Judicature, civil or criminal, and which repealed section 59 of Regulation IX of 1793 and section 28 of Regulation VII of 1803, is also instructive in this connection. This Regulation was repealed by Act XVII of 1862. Meanwhile, Act XXX of 1841 had been placed on the Statute Book, and thereby it was provided that any person using menacing gestures or expression or otherwise obstructing justice in the presence of an officer trying criminal cases or in any superior or inferior civil, or criminal Court, was liable to pay a fine of two hundred rupees, or, in default of payment, to suffer imprisonment for one month; it was further laid down that where no proceedings had been held under this clause in the Court where the offence was committed, any party amenable to the Supreme Court might be indicted as for a misdemeanour. It is significant that on the 3rd February 1843, the Sadar Nizamat Adalat issued a construction (128) by which it was ruled that Act XXX of 1841 was the only law under which contempt of court could then be punished, as already laid down in construction 225 of the 17th October 1842, and that, consequently, prevarication could not be any longer punished as

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Mooharjee, J.

contempt of court as it was not correctly classable as an obstruction to justice under Act XXX of 1841. It is also worthy of note that the Sadar Nizamat Adalat had previously ruled in construction 619 of the 21st January, 1831, that under the Regulations as they stood at the time, the only contempt which the Court had authority to punish was contempt committed in open Court. From an examination of the legislative provisions on the subject and of the constructions issued thereon by the Sadar Nizamat Adalat from time to time, it is to my mind plain beyond serious controversy that the Sadar Nizamat Adalat, when it was abolished, had no jurisdiction to punish for a contempt of a subordinate criminal Court on the other hand, there are ample indications that its authority to punish for contempt of itself was of a somewhat restricted character. Consequently it follows from this review of the status and constitution of the Supreme Court, the Sadar Dewani Adalat and the Sadar Nizamat Adalat, to punish for contempt of court, that none of these Courts would have been competent to punish contempt of an inferior criminal Court at Barisal in the circumstances of the case before us. The conclusion is inevitable that the jurisdiction, power, and authority, which this Court has inherited from the three abolished Courts is of no avail to the Crown.

The next question which requires examination is, whether this Court apart from its inherited jurisdiction, power, and authority, is competent under the Indian High Courts Act and its Letters Patent, to punish for contempt of a subordinate criminal Court. Clause 1 of the Letters Patent constitutes the High Court to be a Court of Record and this was continued by the Letters Patent of 1865. It is plain, therefore that in one respect the High Court is in a position different from that occupied by one of the abolished Courts, namely, the Sudder Nizamat Adalat which was, as we have seen, not a Court of Record nor a King's Court. It has been argued in support of the application that the High Court as a Court of Record has inherent authority to punish for a contempt of a subordinate Court which is subject to its superintendence under section 15 of the Indian High Courts Act and over which it exercises appellate and revisional jurisdiction under clauses 27 and 28 of the Letters Patent of 1865, which replace clauses 26 and 27 of the Letters Patent of 1862. Now, it is indisputable that a Court of Record has authority to punish for contempt. Sir Barnes Peacock C. J. observed in *re Abdool* (1) that this Court by the express terms of the Letters

(1) (1867) 8 W. B. Cr. 32.

Patent, is a Court of Record, and there can be no doubt that every Court of Record has the power of summarily punishing for contempt. To the same effect, is the observation of Lord Chelmsford in *Mcdermott v. Fudges of British Guiana* (1): see also *Kochappa v. Sachi* (2). This proposition, when applied to cases of contempt of a Court of Record itself, is defended on the ground that the right of every superior Court of Record to punish for contempt of its authority or process must be deemed inherent from the very nature of its organisation and essential to its existence and protection and to the due administration of justice. But, obviously, a very different question arises, when it is claimed that a Court of Record has authority to punish for contempt of a subordinate Court which is subject to its superintendence and over which it exercises appellate or revisional jurisdiction. When such a claim is put forward, it becomes necessary to examine whether the principle on which the rule is founded in so far as contempt of its own authority is concerned, is equally applicable to the case where it is alleged that there has been a contempt of a court subordinate thereto. Now, what is a Court of Record? Blackstone, in his Commentaries (Book 3, Chapter III, page 24) states that a Court of Record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the records of the Court and are of such high and supereminent authority that their truth is not to be called in question. All Courts of Record are the King's Court, in right of his Crown and Royal dignity, and, therefore, no other Court hath authority to fine or imprison; so that the very erection of a new jurisdiction with the power of fine or imprisonment makes it instantly a Court of Record. With regard to this statement, it may be observed that every Court of Record has not necessarily a power to fine or imprison and there may be King's Courts which are not of Record. Stephen in his Commentaries (15th edition 1908, Vol. 3, page 314) reproduces the statement of Blackstone, but with an important variation, namely, he says that "all Courts of Record are the Courts of the King, in right of his Crown and Royal dignity; and therefore no other Court hath authority to fine and imprison for *contempt of its authority*" and refers in support of this proposition to Hawkins on Pleas of the Crown Book 2 Chap. 22, Sec. 1 Bacon's Abridgment Tit. Courts, *E. R.*

ORIGINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Moohorjee, J.

(1) (1868) L. R. 3 P. O. 841 (868).

(2) (1902) L. L. R. 28 Mad. 494.

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Mookerjee, J.

v. Clement (1) *R. v. Davison* (2) *R. v. James* (3) *Miller v. Knox* (4) *Doe d. Caraigan v. Bywater* (5). It is further pointed out that in some Courts of Record, for example in County Courts, this power to punish for contempt is limited to contempts committed in the face of the Court, as indicated by *Levy v. Moylon* (6) and *R. v. Lefroy* (7). It is fairly clear therefore that the definition of a Court of Record as given by Blackstone and Stephen does not indicate that a Court of Record, whether so by Parliamentary Statute, by Letters Patent or by prescription, possesses, as such, any inherent authority to punish a contempt of a subordinate Court. Is there, then, anything in the reasons assigned in support of the principle that a Court of Record can punish a contempt of its own authority which makes them applicable to a contempt of authority of a subordinate Court. Blackstone in his Commentaries (Vol. IV, page 286) declares that "laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised as early as the annals of our law extend." To the same effect is the exposition given by Mr. Justice Field in *Ex parte Robinson* (8): "The power to punish for contempt is inherent in all Courts. Its existence is essential to the preservation of order in judicial proceeding and to the enforcement of the judgments, orders, and writs of Courts and consequently to the due administration of justice." Gray C. J. observed in similar terms in *Cartwright's Case* (9) "that the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in Courts of Chancery and other superior Courts, as essential to the execution and to the maintenance of their authority and is part of the law of the land."

Harris J. stated in *Watson v. Williams* (10) that "the power to fine and imprison for contempt, from the earliest history of jurisprudence has been regarded as a necessary incident and attribute

(1) (1831) 4 B. & Ald. 218.

(2) (1821) 4 B. & Ald. 329.

(3) (1832) 5 B. & Ald. 894.

(4) (1838) 4 Bing. N. C. 574.

(5) (1849) 7 O. B. 794.

(6) (1850) 10 O. B. 189; 84 B. B. 524.

(7) (1878) L. R. 8 Q. B. 134.

(8) (1878) 19 Wallace 506.

(9) (1878) 114 Mas. 238.

(10) (1850) 86 Mils. 841.

of a Court, without which it could no more exist than without a Judge; it is a power inherent in all Courts of Record and co-existing with them by the wise provision of the common law." Snyder J. observed in *State v. Frew* (1) that it was "a proposition of law unquestioned and unquestionable that by the common law of England as well as by the uniform decision of the Courts of the United States, Courts have the inherent power to punish contempt in a summary manner, and that this power is an essential element and part of the Court itself, which cannot be taken away without impairing the usefulness of the Court, because it is a power necessary to the exercise of all others." Marshall J. observed in *State v. Shepherd* (2) that if the Court did not possess the power to punish contempts committed against itself, the jury and its officers summarily, it would be easy for a contemner to escape punishment entirely, for if the matter was sent to another Court or left to be tried by a jury, the contemner could so insult and abuse such other Court or the jury as to render it impossible for them also to try him also, and by thus renewing his offence to every Court he was called before, make it impossible to punish him at all. It is plain that the reasons thus assigned do not indicate that a Court of Record has inherent power to punish for contempt of an inferior Court over which it exercises a power of superintendence and which is subject to its appellate and revisional jurisdiction. On the other hand, it is a fundamental rule that ordinarily one Court cannot punish a contempt against another Court or Judge, and this principle is based on the doctrine that the offence is substantially criminal and the power to punish it is vested alone in the Court whose judicial authority is challenged. *Ex parte Bradley* (3) *Ex parte Tillinghast* (4) *Callan v. McDaniel* (5), *Tindall v. Westcott* (6), *Atchison Railway Co. v. Fennison* (7), *In re Williamson* (8), *Voorhees v. Albright* (9). The position, however, is obviously different where the contempt is against subordinate officers of the Court; such a contempt is rightly regarded as contempt of the authority of the Court by which the officer was appointed and may be punished on well recognised principles. There is consequently no foundation laid by the Crown for the theory that this Court as a Court

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Mookerjee, J.

(1) (1884) 24 W. Va. 416; 49 Am. Rep. 257.
 (2) (1903) 177 Ma. 305; 99 Am. St. Rep. 624; 78 S. W. 79.
 (3) (1868) 7 Wallace 864. (6) (1900) 113 Georgia 1114; 58 L. R. A. 225
 (4) (1880) 4 Peter 108. (7) (1866) 60 Mich 232; 27 N. W. 6.
 (5) (1882) 72 Alabama 96. (8) (1855) 26 Pa. St. 9; 67 Am. Dec. 874.
 (9) (1879) 28 Fed. Cas. 16999.

ORIGINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Mookerjee, J.

of Record has authority to punish for contempt of the Court of the Magistrate of Barisal, merely because this Court, as a Court of Record exercises power of superintendence over that Court or because that Court is subject to its appellate and revisional jurisdiction. The hypothesis that a superior Court which exercises a power of superintendence over a subordinate Court possesses by implication a power to afford to such Court protection against contempts of its authority is no doubt attractive, but has no solid foundation in the history of the constitution of our Courts. The Advocate-General has however strongly relied upon three cases. The first of these, *Surendra Nath Banerjee v. Chief Justice of Bengal* (1) is of no assistance. In that case, the contempt was of the authority of this Court in the exercise of its original civil jurisdiction; there is no room for controversy that this Court had ample authority to punish contempt of that description. The second case upon which reliance is placed is the decision in *In re Venkat Rao* (2). With all respect for the learned Judges who decided that case, I am unable to agree in their view that the High Court possesses the inherent common law powers in connection with matters of contempt which were exercised formerly by the Court of King's Bench and now by the King's Bench Division. In support of this comprehensive proposition, they rely upon the decision of the Judicial Committee in *Surendra Nath Banerjee v. Chief Justice of Bengal* (1). But, as already explained, in the latter case the contempt had been committed in relation to the High Court in the exercise of its original civil jurisdiction. Now, it cannot be questioned that the High Court in so far as it has inherited the jurisdiction, power and authority of the abolished Supreme Court can exercise all the powers, which might have been exercised by the Supreme Court, and consequently the powers exercisable by the Court of King's Bench, although, even upon this matter, there may be room for controversy, whether, in so far as contempt proceedings are concerned, the more recent development of the law in England is applicable in this country, in view of the provisions of clause 21 of the Charter of 1774, which may indicate that the growth of the law on this subject has been arrested. That is a question of some nicety, however, upon which I reserve my opinion; but it is plain that the proposition that the High Court in so far as it has inherited the jurisdiction of the abolished Supreme

(1) (1838) 1 L. R. 10 Calo, 109.

(2) (1911) 21 M. L. J. 832.

Court possesses inherent common law powers in connection with matters of contempt which were exercised by the Court of King's Bench, is of no assistance in the solution of the problem now before us, namely, whether the High Court as a Court of Record can punish for contempt of a subordinate Court over which it exercises powers of superintendence and which is subject to its appellate and revisional jurisdiction. The fundamental distinction between two questions is easily realised from an examination of the decision in *King v. Davies* (1) upon which the Advocate-General relies as the learned Judges of the Madras High Court did in *In re Venkat Rao* (2). The decision in *Rex v. Davies* (1) is based on the ground that the King's Bench Division has power to punish by attachment contempts of inferior Courts. This conclusion is not based on the ground that the King's Bench Division possesses this power merely because it is a Court of Record, or because it exercises powers of superintendence over inferior Courts. It is clear from the judgment as also from the judgment in the earlier case of *R. v. Park* (3), that the decision is founded on a historical consideration of the supreme place in the judicature assigned to the Court of King's Bench which according to Lord Coke had power to "correct errors and misdemeanours extra-judicial tending to the breach of the peace or oppression of the subject or any other manner of misgovernment," and according to Hawkins had power to "deal with every kind of misdemeanour, including those which are properly the subject of indictment or criminal information as well as those which are punishable summarily by attachment." To use the language of Mr. Justice Wills, the authorities quoted by him served to show the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior Courts and that it is in a special manner the guardian and protector of public justice throughout the kingdom. It is obvious that these considerations of a very special character have no application to this Court, and if we were to apply the principle which lies at the foundation of the decision in *R. v. Davies* (1) we would have to hold that the common law of England is applicable throughout the jurisdiction of this Court, even to persons other than British subjects beyond what was the territorial limits of the ordinary jurisdiction of

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Meekaryee, J.

(1) (1906) 1 K. B. 82.

(2) (1911) 21 M. L. J. 882.

(3) (1908) 2 K. B. 482.

ORIGINAL.

1913.

In the matter of
The Amrita Bazar
Patrika.

Vankarjee, J.

the abolished Supreme Court. Such a view would be clearly erroneous and in direct contravention of the express provision of the Letters Patent whereby this Court was constituted. It is further worthy of note that even in England the decision in *R. v. Davies* (1) has met with adverse comment, as it was unquestionably an extension of what had been up to that time generally regarded as the limits of the law on the subject: *R. v. Burchett* (2), *In the matter of an application for an attachment for contempt of Court* (3). A similar view has been taken in the Courts of the United States. There it has been held that a superior Court cannot punish for contempt of an inferior Court: *Penn v. Messinger* (4); *In re Emery* (5). Similarly it has been held that although every superior Court possesses an inherent power of employing contempt proceedings to prevent any interference with its administration of justice, *Ex parte Fernandes* (6), *Ex parte Terry* (7), this power can be exercised only by the superior Court whose authority is being defied. *Androscoggin v. Androscoggin* (8), *People v. Placer County Judge* (9). I am not unmindful that in Victoria it was recently held in *In re Packer* (10) that where a newspaper has published statements tending to prove that a person accused of murder and remanded to appear before a lower Court was guilty, the Supreme Court had jurisdiction to punish the members of the staff of the paper for contempt. This decision, however, like the decisions in *Rex v. Davies* (1) and *R. v. Clarke* (11) has met with weighty adverse comment [25 Harvard L. R. 561] where it is pointed out although the summary contempt process is allowed on the theory that otherwise the Court would be prevented from the exercise of its proper functions, *United States v. Hudson* (12), *Cartwright's Case* (13), the recent authorities by which the law has been extended proceed on the ground that where a subordinate Court is powerless to prevent an interference with its administration of justice, the superior Court should intervene by an attachment for contempt. It is also very significant that when the case of *In re Packer* (10) was taken by way of appeal by special leave to the High Court of the Commonwealth of Australia, *Packer v.*

(1) (1906) 1 K. B. 82.

(2) (1722) 1 Strange 567.

(3) (1886) 2 T. L. R. 351.

(4) (1791) 1 Yeates (Pa) 2.

(5) (1907) 140 Michigan 888, 112 N. W. 951.

(6) (1861) 10 O. B. N. S. 8.

(7) (1888) 128 U. S. 289.

(8) (1862) 49 Me. 322.

(9) (1865) 37 California 151.

(10) (1911) Vict. L. R. 401.

(11) (1910) 108 L. T. 636.

(12) (1812) 7 Oranch 32 (34).

(13) 114 Mass. 230 (239).

Feacock (1), the order of the Supreme Court was supported on the ground that the publication in question constituted a contempt of the Supreme Court itself, although the publication was made while the matter was still before the Justices. It was ruled that where a person has been arrested and charged on information with an offence in respect of which Justices may commit him for trial in the Supreme Court, the publication after his arrest and before he has been so committed, of matter tending to prejudice his fair trial in the Supreme Court is a contempt of the Supreme Court which that Court has jurisdiction to punish. It is worthy of note that even this conclusion was reached with considerable hesitation and reluctance, though the Supreme Court of Victoria has and always has had the same jurisdiction as the Court of King's Bench had in England at common law. It must further be observed that the charge was of murder, which in Victoria is only triable before the Supreme Court, so that the procedure prescribed by law for bringing the accused to trial might be deemed, in principle, a continuous process, beginning with the arrest and ending with the conviction or acquittal, so that the intermediate proceedings were in substance stages in this single process.

It may further be urged against the extension of the doctrine that a proceeding in contempt of the description now before this Court, is really in the nature of a criminal proceeding, *In re Pollard* (2), and the Court must hesitate to create a new crime. The distinction between criminal and civil contempt is of a fundamental character, though it has been sometimes overlooked. A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a civil contempt the proceeding for its punishment is at the instance of the party interested and is civil in its character; in the case of a criminal contempt, the proceeding is for punishment of an act committed against the majesty of the law, and as the primary purpose of the punishment is the vindication of the public authority, the proceedings conform as nearly as possible to proceedings in criminal cases. It is conceivable that the dividing line between the acts constituting criminal and those constituting

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Mookerjee, J.

(1) (1912) 18 Com. L. B. 577.

(2) (1866) L. B. 2 P. O. 106; 5 Moo. P. O. N. 8 111.

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Mookerjee, J.

civil contempts may become indistinct in those cases where the two gradually merge into each other. But, in ordinary cases, the line of demarcation is not difficult to determine: *Scott v. Scott* (1). Reference may in this connection be made to the judgment of Lord Hardwicke in the case of *In re St. James's Evening Post* (2), where the Lord Chancellor observed as follows: "There are three different sorts of contempt. One kind of contempt is, scandalising the Court itself. There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here. There may be also a contempt of this Court, in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters." It is worthy of note that the first kind of contempt mentioned by Lord Hardwicke is a matter wherein the State is vitally interested; it is obviously a criminal contempt. The other two kinds of contempt spoken of are such as directly affect a party litigant, and at the same time affect the State in so far as it is of importance "to keep the streams of justice clear and pure." [See also *In re Charlton* (3), *Macgill's case* (4), *In re Wallace* (5), *People v. Oyer and Terminer Court* (6), *State v. Knight* (7).] The distinction between a civil and a criminal contempt is explained by Mathew J. in *In re Davies* (8) and is also clear from *Onslow's case* (9) and *Skipworth's case* (10). In my opinion, it is plain beyond controversy that if the contempt alleged in this case be established, it is a criminal contempt: *R. v. Grey* (11), *American Exchange v. Gillig* (12), *R. v. Davies* (13) and *McLeod v. St. Auben* (14). Consequently, what the Court is invited by the Advocate-General to do is to create a new crime, because, as has been conclusively established, at the time when this Court was constituted none of the three abolished Courts had, notwithstanding the preamble to the Indian Penal Code, jurisdiction to punish for the criminal contempt alleged in the case before us. If a contempt of this character is to be treated as a crime, and is to be made summarily punishable [*Queen v. Lefroy* (15) and *R. v. Brompton* (16)], the

(1) (1918) 20 T. L. R. 520.

(2) (1742) 2 Atk. 469 (471).

(3) (1887) 2 My. and Cr. 816.

(4) (1744) 2 Fowl. 404.

(5) (1866) L. R. 1 P. O. 268.

(6) (1886) 101 N. Y. 245; 54 Am. Rep. 691.

(7) (1893) 3 S. D. 509; 44 Am. St. Rep. 809.

(8) (1888) 21 Q. B. D. 286.

(9) (1878) L. R. 9 Q. B. 219.

(10) (1878) L. R. 9 Q. B. 280.

(11) (1900) 2 Q. B. 36.

(12) (1889) 58 L. J. Ch. 706.

(13) (1906) 1 K. B. 82.

(14) (1899) App. Cas. 549.

(15) (1878) L. R. 8 Q. B. 184.

(16) (1898) 2 Q. B. 200.

* question is obviously a matter for the consideration of the legislature and beyond the decision of the Court. On these grounds, I feel convinced that this Court, though it is a Court of Record and though it exercises powers of superintendence over the Court of the Magistrate at Barisal and though that Court is subject to the appellate and revisional jurisdiction of this Court, has no power to punish for contempt of the Court of the Magistrate at Barisal.

As the second question has been answered in the negative, the third question now requires consideration, namely, do these articles constitute a contempt of this Court, so as to render the printer and publisher liable to punishment for that contempt. This aspect of the matter was not developed, possibly not even appreciated, on behalf of the Crown, but it merits examination, as it is the only possible ground upon which the present application may be supported with any semblance of plausibility. Before I proceed to consider the articles, it is necessary however to premise that conduct which amounts to contempt of a subordinate Court does not necessarily amount to contempt of a superior Court. It is not essential for the present purpose to specify exhaustively the various acts which may constitute contempt. Blackstone in a celebrated passage of his Commentaries (Vol. IV, page 285) specifies some of them: "Some of these contempts may arise in the face of the Court; as by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever; others in the absence of the party; as by disobeying or treating with disrespect the King's writ, or the rules or process of the Court; by perverting such writ or process to the purposes of private malice, extortion, or injustice: by speaking or writing contemptuously of the Court of judges, acting in their judicial capacity; by printing false accounts (or even true ones), without proper permission, of causes then depending in judgment; and by anything, in short, that demonstrates a gross want of that regard and respect, which when once Courts of justice are deprived of, their authority (so necessary for the good order of the kingdom), is entirely lost among the people." It may be added that their might be a contempt of Court by tampering with evidence and witnesses or suppressing testimony, or, as is put in *Skipworth's case* (1), if witnesses are attacked, frightened, or deterred. Contempt may also be

(1) (1878) L. R. 9 Q. B. 280 (282).

ORIGINAL

1918.

In the matter of
The Amrita Bazar
Patrika

Mookerjee, J.

ORIGINAL.

1913.

In the matter of
The Amrita Bazar
Patrika.

Mookerjee, J.

committed by publications concerning a pending cause, trial or judicial investigation, calculated to prejudice or prevent fair and impartial action, which seeks to influence judicial action by threats or other form of intimidation, which reflect upon the Court, counsel, parties, or witnesses respecting the cause, which are calculated to threaten or intimidate witnesses or which tend in any manner to corrupt or embarrass in any manner the due administration of justice. *Daw v. Eley* (1), *In re Crown Bank* (2), *R. v. Skipworth* (3), *R. v. Clement* (4), *Little v. Thomson* (5), *R. v. O'Dogherty* (6), *Tichborne v. Tichborne* (7), *Kilcat v. Sharp* (8), *Hunt v. Clarke* (9). In the case before us, the only imaginable ground on which it can be argued that the articles in question constitute a contempt of this Court, is that witnesses might be kept back, with the possible result that there might not be a fair trial, and that if the matter should be hereafter brought up to this Court, this Court might be hampered in the due administration of justice. Let it be assumed for the purposes of argument and for that purpose alone that there may be a contempt of this Court under circumstances like these, that is, by publication of an improper character made long before the proceedings have been brought to this Court. The question arises, do the articles to which exception is taken, fall within this category? The Advocate-General minutely criticised the language used in these articles; in fact the analysis was so clear and the criticism so severe that they considerably diminished the weight which the Court would otherwise be inclined to attach to an argument on behalf of the Crown in a proceeding of a criminal nature. The obvious course to pursue in cases of this description is to read the articles as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary. Tested from this point of view, how do these articles stand? In the first place, they comment upon the method of house searches and the annoyance and hardships they cause in many instances to innocent persons. In the second place, they comment upon the mode of arrest of suspected persons, sometimes in what may not inappropriately be called an almost dramatic manner. In the third place, these articles comment

(1) (1868) L. B. 7 Eq. 40.

(2) (1890) 44 Oh. D. 649.

(3) (1878) 19 Cox. 871; L. R. 9 Q. B. 280.

(4) (1831) 4 B. & Ald. 218; 28 B. R. 260; 25 B. R. 710.

(5) (1839) 2 Beauv. 129.

(7) (1870) 89 L. J. Oh. 898.

(6) (1848) 5 Cox. 848.

(8) (1889) 52 L. J. Oh. 184.

(9) (1839) 58 L. J. Q. B. 490.

upon the employment of Gurkha soldiers, which it is asserted is wholly unnecessary for purposes of judicial investigation of the alleged crime. In the fourth place, the articles comment upon the mode of treatment of the persons arrested, and it is suggested that those against whom there is no direct evidence should not be treated with needless severity and harshness. If we do not allow ourselves to be embarrassed by ingenious comments, we can hold without difficulty that positive evidence here means direct evidence as opposed to circumstantial evidence, in other words, the evidence of an eye witness. In substance the article asserts that persons who have not been proved to be guilty or persons against whom there is no direct evidence should be deemed innocent and treated as such. In the fifth place, these articles express the opinion that the accused ought not to be tried by a special Magistrate but by this Court. This comment is futile, because the accused cannot under the law be tried by a special Magistrate; the investigation may be made by a Magistrate, but the trial must take place before the Court of Session. On the other hand, the case cannot be tried by this Court, unless the statutory conditions formulated in the Indian Criminal Law Amendment Act, 1908, have been fulfilled, namely, that there has been a determination by the Government that the conditions, under which such mode of trial is permissible, exist in the present instance, that is, such trial is needed in the interests of peace and good order. This determination, as has been repeatedly pointed out, is not a matter of form but of substance, a matter of judgment founded upon the materials on which the prosecution is intended to be based. In the sixth place, these articles express the desire that such amongst the accused as are guilty should be punished, but such as are innocent should be acquitted on a fair trial. In the seventh place, these articles implore His Excellency the Governor to examine the matter for himself and to determine whether the material before him justifies the initiation and continuance of the proceedings. In the eighth place, these articles do undoubtedly insinuate in places that the preliminary investigation by the Police has been carried on in an objectionable manner. An insinuation of this description may merit strong disapprobation, and it is unfair to the investigating officers, inasmuch as the vagueness and generality of the charge makes it impossible for any individual member to repudiate the charge or to defend his character. But I am

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Meekerye, J.

ORIGINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Montague, J.

unable to accept the contention that an allegation of this character constitutes a contempt of Court. I must emphatically repudiate the astonishing proposition that the Criminal Investigation Department is the prosecutor in the criminal case before the Court of the Magistrate at Barisal, and that consequently imputations, veiled or otherwise, to the effect that the investigation by the department has been carried on in an objectionable manner constitute a contempt of Court. I must assume that the prosecution has been instituted by and with the sanction of the Governor in Council, and that whatever share the Criminal Investigation Department may have in the investigation of the case, they cannot be deemed in law, and, I trust, they are also not in fact, the prosecutors in the criminal case. The statement that the Criminal Investigation Department is really the prosecutor in the criminal case taken along with the circumstance that the articles make insinuations as to the mode of investigation by that Department may no doubt explain the origin of the application made to this Court to commit the printer and publisher for contempt, but it plainly does not establish that the articles do constitute a contempt of the Court of the Magistrate of Barisal, much less of this Court. The Advocate-General has strenuously contended that the articles in question are of an extremely reprehensible character and that in fact it is difficult to imagine any comment on a pending cause more worthy of the strongest condemnation. It must be remembered, however, that we cannot consider these articles except for the determination of one question and one question alone, namely, whether they constitute contempt of this Court. We cannot fairly be invited to express an opinion upon a matter not before the Court, a matter in fact which has not been even argued; but I desire to observe that these articles do not constitute an attack on the local Government, though there has been a tendency in the course of the argument addressed to us on behalf of the Crown to identify the Criminal Investigation Department with the local Government. A plain reading of the articles amply justifies the view that the writer had no motive or intention to embarrass the Government. In my opinion, these articles plainly do not constitute a contempt of this Court, however much one may regret that comments should be published upon a case under judicial investigation. [*Skipworth's case* (1)].

There is finally one important point which I desire to emphasise. The insistence with which this application has been pressed before the Court by the Advocate-General plainly indicates that it has been overlooked on behalf of the Crown that an applicant is not entitled as a matter of right to an order for the commitment of a person for contempt, but that the application is always addressed to the discretion of the Court. The power, it is well settled, must be exercised with caution and only when the case is clear beyond controversy because, as Sir George Jessel observed in *Plating Company v. Farquharson* (1) it is an arbitrary jurisdiction. There is no limit to the amount of the fine which may be inflicted or to the length of the term of imprisonment which may be directed; there is no appeal as a matter of right against an order of attachment. Besides, as observed in *O'Shea v. O'Shea* (2), it is the only criminal offence summarily punishable. The Court will consequently not make an order for attachment, unless it is satisfied beyond dispute that the order is needed peremptorily in the interests of the administration of justice. Reference may usefully be made to the emphatic warning given by eminent Judges against the inconsiderate use of this power: *R. v. Parnell* (3), *R. v. Grey* (4), *McLeod v. St. Aubyn* (5), *In re Clements* (6), *R. v. Dolan* (7). This reluctance of the Courts to take action, except in cases of great gravity, may be traced to quite respectable antiquity. Historians record that when Emperor Augustus desired to punish a historian for contempt, Mecænas advised him that the best policy was to let such things pass and be forgotten. Cæsar said on a similar occasion that to retaliate was only to contend with impudence and put oneself on the same level, and even Tiberius acted upon the same view. The Theodosian Code also made this the law and expressly declared that slanderers of Majesty should be unpunished, for if this proceeded from levity, it was to be despised; if from madness, it was to be pitied; and if from malice, it was to be forgiven, for all such sayings were to be regarded according to the weight they bore.

After an anxious consideration of the articles and of the arguments addressed to us on behalf of the Crown by the Advocate-General, my deliberate conclusion is that the application is entirely misconceived and no order for attachment should be made. In my opinion, the application must be refused with costs.

A. T. M. Application refused.

CRIMINAL.

1918.

In the matter of
The Amrita Bazar
Patrika.

Meekarjee, J.

(1) (1831) 17 Ch. D. 49.

(2) (1890) 15 P. D. 59.

(3) (1890) 14 Cox 44.

(4) (1900) 2 Q. B. 86.

(5) (1899) App. Cas. 549.

(6) (1877) 46 L. J. Ch. 375 (380).

(7) (1907) 2 L. R. 260.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K. C. J. E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.*

SRIMATI MAHAMAYA KAR

v.

KISHORE CHANG.*

CIVIL

1911.

May, 28.

Rent, enhancement of—Settlement for term on nominal rent—Less rent payable during term—Rent payable—Nominal rent mentioned payable after term—Bengal Tenancy Act (VIII of 1885), Sec. 29, cl. (b).

The provision of section 29 cl. (b) of the Bengal Tenancy Act applies not only to contracts executed at the time of the enhancement but to contracts executed some years before.

A *kabuliat* for a term of years began with a tabular statement, which showed the rent to be Rs. 87-4as. in all. Out of this, the sum of Rs. 17-2as. was remitted for some unexplained reason, and the remaining rent was fixed at Rs. 40-2as. for the period of the *kabuliat*. The *kabuliat*, after the tabular statement, went on to describe the rent as being Rs. 40-2as. during its terms, and contained a stipulation that, at the end of the term the tenant would take a settlement at the rate of Rs. 87-4as. and if he did not, the landlord would be entitled to realise the rent by suit:

Held, that the *kabuliat* was an attempt to evade the provisions of section 29 cl. (b) of the Bengal Tenancy Act; that at the end of the term, the tenant's rent could not be enhanced so as to exceed by more than 2 annas in the rupee the sum of Rs. 40-2as.

Appeal by the Plaintiff.

Suit for rent based on a *kabuliat*.

The material facts are stated above.

The appeal first came to be heard by Mr. Justice Cox.

Babu Harendra Narayan Mitra for the Appellant.

Babu Upendra Lal Roy for the Respondent.

The following judgment was delivered by.

Coxe J.—This appeal arises out of a suit for rent, based on a *kabuliat* executed by the defendant's father in 1303. The *kabuliat* was for 7 years; and the only question that is raised in this appeal is whether this *kabuliat* contravenes the provisions of section 29 of the Bengal Tenancy Act.

The Munsif apparently found that the tenancy of the defendant's father began with the execution of this *kabuliat* and that he was not in occupation of the holding before it.

* Letters Patent Appeal No. 150 of 1911, against the decision of Mr. Justice Cox, dated the 2nd May, 1911, in Appeal from Appellate Decree No. 976 of 1909, against the decree of A. H. Cumming, Esq., District Judge of Tippera, dated the 8th February, 1909, reversing that of Babu J. K. Mukerjee, Munsif, 1st Court of Tippera, dated the 12th March, 1908.

1911.

May, 28.

This matter has not been dealt with by the learned District Judge in appeal; and for the purpose of dealing with this appeal it may be assumed that he did not differ from the decision of the Munsif on this point. The *kabuliat* begins with a tabular statement, which shows the rent to be Rs. 10 a *kani*, amounting to Rs. 57-4 annas in all. Out of this the sum of Rs. 17-2 annas is remitted for some unexplained reason; and the remaining rent is fixed at Rs. 40-2 annas for the period of the *kabuliat*. The *kabuliat*, after the tabular statement, goes on to describe the rent as being Rs. 40-2 annas during its term and contains a stipulation that, at the end of the term the tenant shall take a settlement at the rate of Rs. 57-4 annas and if he does not, the landlord shall be entitled to realize that rent by suit. There is also a provision that land found to be in excess of the amount leased will be subject to a rent of Rs. 10 a *kani*.

The learned District Judge regards this *kabuliat* as an attempt to evade the provisions of section 29 of the Bengal Tenancy Act. He says: "If this stipulation in his lease were to be held good it would always be within the power of a landlord granting a lease to put in the lease that the rent was, say Rs. 50, whilst he allowed the tenant to pay only Rs. 30. He would then, when the lease expired, allege that Rs. 50 was the rent and then thus, by this device, he would clearly be able to enhance the tenant's rent by considerably more than 2 annas in the rupee."

With this view of the learned District Judge I am in agreement. No doubt, when the *kabuliat* was executed the landlord was perfectly entitled to settle the land at the rate of Rs. 57-4 annas, if he could get a tenant to take it on those terms. It may, at first sight, seem unreasonable that if he could have done this he should not be allowed to settle the rent at the rate of Rs. 40-2 annas for 7 years and afterwards at a higher rate. But a little reflection is sufficient to show that this would be wholly against the policy of the Bengal Tenancy Act. The landlord might find great difficulty in settling this land at the present rate of Rs. 57; but it might not be so difficult for him, considering the notorious improvidence of raiyats, to settle the land for several years at a reasonable rent, with a stipulation that, at some distant period, the raiyat should be bound to pay a higher rent; and it is clear, as the learned District Judge points out, that, by adopting this expedient, the landlord by a carefully

Civil.
1918.
Mahamaya Kar
v.
Kishore Chandra
Chowdhury, J.

CIVIL.

1918.

Mahamaya Kar

v.
Kishore Chandra

Goswami, J.

drafted lease might contract himself entirely out of the provisions of the Tenancy Act. The words of section 29, clause (b) are that "the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the raiyat." There can be no doubt whatever that the rent payable during the term of the *kabuliat* was Rs. 40-2 annas. The nominal rent might have been recorded as Rs. 57-4; but the *kabuliat* itself exempts the raiyats from paying this sum, and the sum payable by him, therefore, was only Rs. 40-2 annas. Accordingly, under this clause, at the end of the term, his rent could not be enhanced by contract so as to exceed by more than two annas in the rupee the sum of Rs. 40-2 annas. I do not think, reading the words of the section, that this provision applies only to contracts executed at the time of the enhancement. The words are sufficiently wide to include contracts executed some years before. It cannot be disputed that the practical effect of the *kabuliat* now under consideration is that at the end of the term the rent of the raiyat is enhanced so as to exceed by more than 2 annas in the rupee the sum which has been payable by him during the term. Taking this view, I think that the decision of the learned District Judge is right and that the appeal should be dismissed with costs.

Against this decision, the plaintiff appealed under section 15 of the Letters Patent.

Babu Sasadhar Roy for the Appellant.

Babu Troylakya Nath Ghose (for *Babu Upendra Lal Roy*) for the Respondent.

The judgment of the Court was delivered by

May, 28.

Jenkins C. J.—This case does not require citation of any authority. It is clear from section 29 of the Bengal Tenancy Act that the rent cannot be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the raiyat. The lower appellate Court has found that this rent was Rs. 40-2as.; and the reference to Rs. 57 was merely a device. That finding is conclusive in this case. We must therefore, dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.*

INDRAMANI DASYA

v.

PRIYA NATH CHAKRAVARTI AND ANOTHER.*

CIVIL

1918.

June, 10

*Revenue Sale—Share in arrear—Estate not in arrear—Revenue Sale Law
(Act XI of 1859), Sec. 13—'Estate'—Defaulter, if to show erroneous
debit—Collector's jurisdiction to sell.*

The term estate as used in the clause "if the estate shall become liable to sale" in section 13 of the Revenue Sale Law, means the entire estate out of which the separate share has been carved.

If the estate as a whole has become liable to sale for arrears of revenue, the question arises which portion or portions thereof should be brought to sale. Under section 13 of the Revenue Sale Law the Collector can put up to sale only that share or those shares of the estate, which has thus become liable to sale for arrears of revenue, from which, according to the separate accounts, an arrear of revenue may be due.

If the estate is not liable to sale for arrears of revenue, the Collector has no jurisdiction to put up any share thereof to sale.

Balikhon v. Simpson (1) referred to.

It is not obligatory upon the defaulter to show how the erroneous debit in the Collector's book originated.

Appeal by the Plaintiff.

Suit to set aside a revenue sale.

The share of the plaintiff was separated in 1887, and the order came into effect from the beginning of the year 1888-9. At the end of the year 1905-6, the amount due from the plaintiff for her share was Rs. 5-9-6p. but in the residuary estate there had been over payments and a sum of Rs. 5-13-2p. stood to the credit of that estate. Thus there was a sum of 3 annas 8 pies in excess to the credit of the estate. On the 14th September, 1906, the plaintiff's separate account in *taluk* was sold by the Collector under the provisions of Act XI of 1859 for arrears of Rs. 6-14-6p. That sum was made up of 12as 6p. on account of 1904, Rs. 3-1a. on account of 1905 and Rs. 3-1a. on account of 1906. From 1888 to 1904, the plaintiff paid 6 pies a year in excess of the amount due. She had thus overpaid 8as. 6p. At the end of the year 1903-4 consequently the account ought to have shown 8as. 6p. to her credit, but they erroneously show against her 12as. 6p.

* Letters Patent Appeal No. 2 of 1911, against the decision of Mr. Justice Casper, dated the 25th November, 1909, in Appeal from Appellate Decree No. 483 of 1909, against the decree of Babu Mohini Mohon Dutt, Subordinate Judge of Faridpur, dated the 30th November, 1908, affirming that of Babu Birendra Kumar Dutt, Munsiff 2nd Court at Bhanga, dated the 4th July, 1908.

(1) (1888) I, L. R. 25 Calo. 888.

CIVIL.

1918.

Indramani Dasya

v.

Priya Nath.

1910.

November, 25.

The Courts below dismissed the suit. The plaintiff preferred an appeal to the High Court. The appeal came up for hearing before Mr. Justice Caspersz, who delivered the following judgment.

Caspersz, J.—On the 14th September, 1906, the plaintiff's separate account in *taluk* 555 was sold by the Collector under the provisions of Act XI of 1859 for arrears of Rs. 6-14-6. That sum was made up of Rs. 12-6p. on account of 1904, Rs. 3-1 on account of 1905, Rs. 3-1 on account of 1906. The plaintiff instituted this suit on the allegation that as a matter of fact no arrears were due from her to the Government. It was sought to be shown that the plaintiff had paid an excess of 8 annas on account of her separate share since the opening of that account in 1888, and that a sum of Rs. 3-1a-6p. (being six pies in excess) was paid yearly from 1888 to 1904. Furthermore, it was sought to be shown, and a certain rule or practice was relied upon, that, inasmuch as a sum of Rs. 5-13-2 was the surplus in favour of the parent (residuary) estate, that surplus might be taken into account and deducted from any arrears due from any separate share.

The Court of first instance dismissed the suit and went so far as to say,—“It was very easy for the plaintiff to show in which year or years the wrong debit if any began to be committed but she has intentionally suppressed that evidence.” It was observed by the Munsif that there was nothing to show whether, when the separate account was opened in her name, there was any arrear in respect of her share or of the whole estate.

On appeal, the subordinate Judge has confirmed the decision of the first Court, and the argument of the learned vakil for the plaintiff is that, on a proper construction of the *challans*, extracts from the Touzi Register and Ledgers, it has been conclusively shown that no arrears were due from the plaintiff's separate share for which the estate could be sold on the 14th September, 1906.

The first difficulty in the way of the plaintiff is that it has not been explained how the Collector's office came to make any mistake and sell the property when no arrears were actually due. In the case of *Bal Kishen Das v. Simpson* (1), the mistake was clearly traced; either there was erroneous debit in the Collector's books against the estate, or erroneous entry of some sort. In this case, there is no elucidation of that kind. Then I am asked to make the presumption that although one of the *chalans*

Exhibit 13, (kist January, 1888), shows a payment of Rs. 1-8-9 as made in respect of estate No. 555, it was really in respect of the separate account opened by the plaintiff in this estate. The succeeding *challans* all show that payments were made on account of the separate account, and the omission to specify that account in Exhibit 13 might very easily have been proved by the Touzi account for that year. It is notorious that estates are not sold under the Revenue Sale Law until after the fullest enquiry and after affording ample opportunity to pay up the alleged arrears. It is unfortunate, no doubt, that this property has been sold, but the plaintiff has failed to show that the Collector had no jurisdiction to sell it.

The findings arrived at in both the lower Courts are conclusive and this appeal must be dismissed with costs.

Against this decision, the plaintiff preferred an appeal under section 15 of the Letters Patent.

Babus Joges Chandra Roy and *Prokas Chandra Masumdar* for the Appellant.

Babus Baidya Nath Dutt and *Tarkeswar Pal Chowdhury* for the Respondents.

The judgment of the Court was as follows :

This is an appeal by the plaintiff in a suit for declaration that a sale for arrears of revenue of her share in an estate held on the 14th September, 1906, was inoperative, and for recovery of possession thereof.

The sale took place for realization of a sum of Rs. 6-4s.-6p. made up as follows : namely 12 annas 6 pies as arrears due at the end of the year 1903-1904, Rs. 3-1 anna as an arrear due in respect of the year 1904-1905 and a second sum of Rs. 3-1 anna as an arrear due in respect of the year 1905-1906.

The case for the plaintiff is that the sale was inoperative because it was held in contravention of the provisions of section 13 of Act XI of 1859. This contention has been negatived by all the Courts, and the question in controversy is as to the true construction of this provision of the law. Section 13 provides that "Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable to sale for arrears of revenue, the Collector or other officer as aforesaid in the first place shall put up to sale only that share or those shares of the estate from which, according to the separate accounts, an arrear of revenue may be due."

CIVIL

1918.

Indramani Dasgupta

Priya Nath

Casper, J.

June, 10.

CIVIL

1918.

Indramani Dasya

v.

Priya Nath.

In the case before us, the share of the plaintiff was separated in 1887, and the order came into effect from the beginning of the year 1888-1889.

Now under section 13 to which reference has been made, the first point to be determined is, whether the estate is liable to sale for arrears of revenue.

On behalf of respondents it has been contended that the term *estate* means, share of an estate. But notwithstanding, the definition of the term *estate* as given in section 1 of Bengal Act VII of 1868, it is plain that the term *estate* as used in the clause "if the estate shall become liable to sale for arrears of revenue" means the entire estate out of which the separate share has been carved. The policy of the Legislature is clear beyond dispute. The first point for determination is, is the estate as a whole liable to sale for arrears of revenue? If it is not, no further question arises. But if the estate as a whole has become liable to sale for arrears of revenue, the question arises which portion or portions thereof should be brought to sale. Under section 13 the Collector can put up to sale only that share or those shares of the estate, which has thus become liable to sale for arrears of revenue, from which, according to the separate accounts, an arrear of revenue may be due.

In the case before us, it has been contended by the plaintiff throughout the litigation that the entire estate which comprised her share had not become liable to sale for arrears of revenue on the 14th of September, 1906. This is a point which has not been investigated by the Courts below. Consequently, it is open to us, under section 103, Civil Procedure Code, upon the materials on the record to determine whether the estate has become liable to sale for arrears of revenue.

Now the plaintiff has established by the production of the receipts for payments made by her from time to time into the Collectorate that from 1888 to 1904, during a period of seventeen years, she had paid 6 pies a year in excess of the amount due. The amount paid by her was Rs. 3-1-6 pies, whereas the amount payable by her in respect of her share was Rs. 3-1 anna; she had thus overpaid 8 annas 6 pies. At the end of the year 1903-1904 consequently the accounts ought to have shown 8 annas 6 pies to her credit, but they erroneously show against her 12 annas 6 pies, and it is not obligatory upon her to show how the error originated. As regards the years 1904-1905 and 1905-1906 it has not been established that she had paid the amounts due. Consequently,

at the end of the year 1905-1906 the amount due from her would be Rs. 6-14-6 pies reduced by 12 annas 6 pies namely Rs. 6-2 annas. But as already explained she had made the excess payment of 8 annas 6 pies. She further proves that in the residuary estate there had been over-payments and a sum of Rs. 5-13-2 pies stood to the credit of that estate. Consequently, a sum of Rs. 6-5as.-8 pies ought to have stood to the credit of the entire estate, and as there was a non-payment of Rs. 6-2as. there would be a sum of 3 annas 8 pies in excess to the credit of the estate. Consequently at the end of the year 1905-1906 the estate had not become liable to sale for arrears of revenue. If the estate, as we have found, was not liable to sale for arrears of revenue the Collector had no jurisdiction to put up any share thereof to sale. Consequently, the sale must be declared as inoperative as explained by their Lordships of the Judicial Committee in the case of *Bal Kishen Das v. Simpson* (1).

The result, therefore, is that this appeal must be allowed, the decrees of the Courts below discharged and the suit decreed. It will be declared that the sale held on the 14th September 1906, was inoperative, and the plaintiff will be placed in possession of the property sold.

This order will carry costs throughout.

A. T. M.

Appeal allowed.

(1) (1898) I. L. B. 25 Calo. 888.

*Before Sir Lawrence Jenkins, K.C.J.E., Chief Justice,
and Sir Asutosh Mookerjee, Knight, Judge.*

GODAI MOLLA AND OTHERS

v.

AMINUDDI HOWLADAR AND OTHERS.*

Rent, suspension of—Tenant, dispossession of—Dispossession.

When a landlord dispossesses a tenant from his holding or a part of his holding, rent is suspended so long as the eviction exists. It is not necessary that the landlord should with his own hand physically turn out the tenant: it is enough if he is a person of whom it can fairly be said that he dispossessed the tenant.

Appeal by the Plaintiff.

Suit for rent for the years 1311 to 1314 B. S.

* Letters Patent Appeal No. 97 of 1911, against the decision of Mr. Justice Casperas, dated the 30th November, 1910, in Appeal from Appellate Decree No. 1122 of 1909, against the decree of Babu Mohini Mohan Dutt, Subordinate Judge of Faridpur, dated the 23rd February, 1909, affirming that of Babu Saroda Kumar Sen Gupta, Munsiff and Court at Madaripur, dated the 7th December, 1908,

CIVIL.

1918.

Indramani Dasya

Priya Nath,

CIVIL.

1918.

June, 4.

CIVIL.

1918.

Godai Molla

Aminuddi Howladar.

1910.

November, 30.

Plaintiff No. 1 dispossessed the defendant No. 1 from one of the four plots by making a settlement of the same with one K. who entered on the land some 10 years after the settlement made with defendant No. 1 in 1293. The Courts below dismissed the suit.

The appeal came to be heard before Mr. Justice Caspersz.

Babu Debendra Nath Ghose for the Appellants.

Moulvi Syed Shamsul Huda for the Respondents.

The following judgment was delivered by

Caspersz J.—This is an appeal in a rent suit brought by the plaintiff to recover arrears of rent of three plots of land for the years 1311 to 1314 B. S. Both lower Courts have concurred in dismissing the suit. The substantial reason on which the judgments of the lower Courts are based is that the plaintiff No. 1 dispossessed the defendant No. 1 from one of the plots in suit by making a settlement of the same with one Kaimuddi who entered on the land some ten years after the settlement made with defendant No. 1 in 1293. It has been found that the plaintiff No. 1 dispossessed the defendant from this plot and, with regard to the *kabuliat* set up by the defendants, it has been found that it is a genuine document. I may mention that the plot in question corresponds with plot 4 of the *kabuliat*.

In second appeal the learned vakil for the plaintiffs has argued, *first*, that the suspension of the entire rent due from defendant No. 1 should not have been allowed as there was no forcible eviction made by the landlord, and, *secondly*, that there is no finding that the *kabuliat* of the defendant No. 1 was actually accepted by the landlord, on whom, therefore, it can not be considered to be binding.

I have considered the best course to adopt in the circumstances of this case. At one time I was disposed to send it back in order that the rent might be apportioned. My attention has been called to the case of *Annada Prosad Mukhopadhyaya v. Mathura Nath Nag Masumdar* (1). It is no doubt undesirable that a tenant should not pay rent for land which he is admittedly enjoying, although he has lost possession of a part of the area originally demised to him. On consideration, I think it will not be right to send back the case to the first Court. It was held in the leading case of *Dhunput Singh v. Mahomed Karim Ispakain* (2) that there should be no apportionment of rent where the whole rent was equally chargeable upon

(1) (1909) 9 O. L. J. 585; 18 O. W. N. 703. (2) (1896) 1 L. R. 24 Calo. 296.

every part of the land demised. We do not know what the relative value may be of the plots still in the defendant's possession and the plot which Kaimuddi has appropriated. I am told that the rent mentioned in the *kabuliat* is Rs. 8-8 per annum without any specification of the bigha rate; moreover as the plaintiff did not ask for apportionment, he may be relegated to another suit, if he be so advised.

If, then, no apportionment can be allowed, the landlord must be penalized, in a suit framed like this, by the entire rent being suspended. The finding is that Kaimuddi actually dispossessed the defendant No. 1. But this was at the instance of plaintiff No. 1, and I think it can be regarded as eviction by the latter.

With regard to the second contention, also, I think the finding as to the genuineness of the *kabuliat* is conclusive. It is somewhat odd that the landlord raised such a plea as that the *kabuliat* was executed by the tenants without his knowledge and that it was not binding on the landlord. I have no reason to think that this was so. The finding is perfectly clear that the *kabuliat* was a genuine document executed by the tenant for the purpose of creating a tenancy of the land in suit.

With these observations, the decision of the lower appellate Court is affirmed and this appeal dismissed with costs.

Against this decision, the plaintiffs preferred an appeal under section 15 of the Letters Patent.

Babu Debendra Nath Ghose for the Appellants.

Babu Joges Chandra Roy for the Respondents.

The following judgment was delivered by

Jenkins C. J.—This appeal turns upon a rule founded on policy which we have no desire to relax. It is that when a landlord dispossesses a tenant from his holding or a part of his holding, rent is suspended so long as the eviction exists. It is not necessary that the landlord should, with his own hand physically turn out the tenant; it is enough if he is a person of whom it can fairly be said that he dispossessed the tenant. That has been found in this case, and we see no reason to interfere with that finding.

We must, therefore, dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

CIVIL.

1918.

Godal Molla

Aminuddi Howlader.

Oaspora, J.

June 4.

*Before Sir Lawrence Jenkins, K. C. J. E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.*

CIVIL.

1918.

June, 11.

SHEIKH JAMAHAR

v.

SHEIKH NAZIR AND ANOTHER.*

*Estoppel—Non-transferable holding—Mortgagee and purchaser of equity of
redemption—Mortgagee, if can question transfer of rights.*

The defendant who was a transferee from a tenant of a non-transferable holding could not be heard to say that his transferor had not a right to transfer the holding or to transfer his rights therein to the plaintiff.

Appeal by Defendant No. 1.

Suit for ejectment.

One Amir Sheikh mortgaged usufructually the disputed holding to the defendant. Subsequently the mortgagor sold his right in the holding to the plaintiffs. The defence *inter alia* was that as the holding was non-transferable, the plaintiff had no right to sue. The lower Courts decreed the suit. On second appeal, the decision was affirmed on the 16th July, 1912, by Mr. Justice Richardson, by the following judgment :

Richardson J.—This appeal arises out of a suit brought by the plaintiffs for possession of a portion of a holding which belonged to one Amir Sheikh. It appears that in the year 1306 Amir Sheikh mortgaged this portion of the holding to the defendant. In 1310 Amir Sheikh sold his right in the same portion of the holding to the plaintiffs. The plaintiffs therefore stand in the shoes of Amir Sheikh as mortgagors. The mortgage was a usufructuary mortgage, the mortgagee being entitled to possession for a term of 9 years from 1306 to 1314.

The case made by the defendant is this : He states that the holding is not transferable. Therefore, he says, the plaintiffs acquired no title by their purchase. And he further alleges that the disputed land was leased to him by the landlord before the expiry of the term of the mortgage.

The lower Courts have concurred in giving the plaintiffs a decree for possession.

This appeal is preferred by the defendant. The principal point urged on his behalf is that by the lease granted by the

* Letters Patent Appeal No. 89 of 1912, against the decision of Mr. Justice Richardson, dated the 16th July, 1912, in Appeal from Appellate Decree No. 8817 of 1910, against the decree of Babu Latu Behari Bose, Officiating 2nd Subordinate Judge of Mymensing, dated the 21st July, 1910, affirming that of Babu Rajani Kumar Ghosh, Additional Munsiff of Iswalgunge, dated the 28th June, 1909.

1912.

July, 28.

landlord he obtained a title independent of the mortgage and is not liable to ejectment at the instance of the plaintiffs. That argument fails on the findings arrived at in the Courts below. The defendant has proved the *kabuliyat* executed by him in favour of the landlord in the year 1314. The first Court, it is clear, found that the defendant, although he was the landlord's *ijaradar* had failed to prove that the *kabuliyat* had been accepted by the landlord or by any body with authority on the landlord's behalf to accept it. As I understand the judgment of the lower appellate Court that Court arrived at the same conclusion. The Subordinate Judge said that "the defendant No. 1 was the *ijaradar* of the *zemindar* and could have easily shewn that the *kabuliyat* was accepted by the *zemindar* and that he paid rents under its terms." Regard being had to what had been found in the first Court, the conclusion is obvious that the lower appellate Court intended to find that the defendant had failed to prove either the acceptance of the *kabuliyat* or payment of rent under its terms. In the paragraph following the sentence which I have just quoted the Subordinate Judge turned to the question of limitation and expressed himself as follows: "The evidence of dispossession in 1312 being very unsatisfactory it may be said that the plaintiffs were dispossessed by the *zemindar* in Aswin 1314 the date on which the *kabuliyat* (Ex. A) was executed by defendant No. 1." It is suggested that these words amount to a finding that there was in fact dispossession by the *zemindar* in 1314 and that the dispossession consisted in the acceptance by the *zemindar* of the *kabuliyat*. In my opinion no such meaning can be attributed to the language of the Subordinate Judge. What, I think, he intended to convey was this that assuming that there was a dispossession of the plaintiffs it took place not in 1312 as the defendant alleged but in 1314 and that consequently the suit was not barred by limitation under the Bengal Tenancy Act. But apart from the question whether the *kabuliyat* was or was not accepted by the landlord, the landlord could confer no title to the holding on a third person until he had put an end to the tenancy of Amir Sheikh and his heirs. The Subordinate Judge has clearly found that some of the heirs of Amir Sheikh are still in possession of a portion of the holding, and that there was no abandonment of the holding on the part of Amir Sheikh or his heirs. In either view of the matter upon the findings of the lower Courts the title set up by the defendant is not established. That being so he has no title from the landlord which

CIVIL.

1913.

Sheikh Jamahar

v.

Sheikh Nasir.

Richardson, J.

CIVIL

1918.

Sheikh Jamahar

v.
Sheikh Nasir.

Richardson, J.

can prevail against the title of the plaintiffs derived from his mortgagor. Being a transferee himself from the original tenant he cannot be heard to say that the tenant had not the right to transfer the holding or to transfer his rights therein to the plaintiffs.

The result is that the appeal fails and must be dismissed with costs.

Against this decision, defendant No. 1 preferred an appeal under section 15 of the Letters Patent.

Babu Chandra Kant Ghose for the Appellant.

Babu Upendra Lal Roy for the Respondents.

The judgment of the Court was delivered by

June, 11.

Jenkins C. J.—The appellant's title originated under a mortgage. He cannot now repudiate that position. We must dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

CRIMINAL REVISION.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

CRIMINAL

1918.

July, 29.
September, 1.

KALI CHARAN MOOKERJEE

v.

EMPEROR.*

"Possession"—*Constructive possession—Bengal Excise Act (V. B. O. of 1909)*
Secs. 2 (13), 46, 48 (a), 52, 61—*Criminal Procedure Code (Act V of 1895)*,
Secs. 236, 237.

The petitioner was in possession of an invoice and bill of lading which purported to cover old wearing apparel exported by Porter & Co. of London to Rasu Prosad at Darjeeling. The bill of lading with endorsement by Porter and Co., and Rasu Prosad were made over by the accused to Cox & Co., in order that the goods might be cleared and passed through the Customs House. The goods were found to contain a large quantity of cocaine which was sought to be illicitly exported in contravention of the provisions of the Excise Act. The accused, when apprised of the discovery, professed to be acting on behalf of Rasu Prosad:

Held, that the accused committed an offence falling under section 61 read with section 46, clause (a) and section 2, cl. (13) of the Bengal Excise Act, of attempting to bring cocaine into Bengal in contravention of the provisions of the said Act and not under sections 46 and 52, as he could not be said to be in "possession" of the cocaine.

* Criminal Revision No. 949 of 1918, against the order of O. Swinhoe Esq., Chief Presidency Magistrate of Calcutta.

Kashi Nath v. Emperor (1) and *Askruf Ali v. Emperor* (2) distinguished.
The doctrine of constructive possession is to be very cautiously applied specially in the department of criminal jurisprudence,
Sections 226 and 227 of the Code of Criminal Procedure applied.

CRIMINAL.

1913.

Kali Charan

v.
Emperor.

The Petitioner was convicted under sections 46 and 52 of the Bengal Excise Act and sentenced to rigorous imprisonment for three months under section 46, by the Chief Presidency Magistrate.

The material facts are sufficiently stated above.

Mr. Jackson, Babu Manmatha Nath Mukerjee and Joges Chunder Bose for the Petitioner.

Mr. Pugh and Babu Jatindra Mohan Ghose for the Crown.

C. A. V.

The judgment of the Court was delivered by

Mookerjee J.—The petitioner Kali Charan Mookerjee was charged before the Chief Presidency Magistrate of Calcutta with the commission of offences under sections 46 and 52 of the Bengal Excise Act, 1909. He was convicted under both these sections, and sentenced to rigorous imprisonment for three months under section 46.

September, 1.

The facts which have been indisputably established by the evidence may be briefly stated. On the 14th January, 1913, the petitioner made over a bill of lading and invoice to a firm of shipping agents in this city known as Cox & Co. The invoice, on the face of it referred to goods described as six bales of old wearing apparel shipped by C. Porter & Co., of London to Mr. Rasu Prasad at Darjeeling in India; the goods were described as nine hundred jackets worth £33-5s. The bill of lading on the face of it described the goods as six packages of old wearing apparel marked R. P. at Darjeeling *via* Calcutta. On the back of the bill of lading were endorsements which purported to be by C. Porter & Co., and Rasu Prasad. The petitioner, when he made over the invoice and bill of lading to Cox & Co., paid to the firm Rs. 30 on account of clearing charges. On the 23rd January, while the goods were under clearance from S. S. *Barneo*, a customs preventive officer, who was on board, noticed five packets of cocaine, each of which contained two phials, near or among the bales of old clothes. This aroused his suspicion and he thereupon seized all the six bales which upon examination, were found to contain 731 packets of cocaine weighing 491 ounces and worth, it is said, at least rupees ten thousand.

(1) (1906) I. L. B. 82 Calo. 557. (2) (1909) I. L. B. 38 Calo. 1016.

CRIMINAL.

1913.

Kali Charan

v.

Emperor.

Mookerjee, J.

On that very day, the petitioner with a view to take delivery presented himself at the office of Cox & Co., who had meanwhile been apprised of what had happened; he attempted to make off and was thereupon taken by one of the assistants of the firm to the Customs House. There he protested that he was not aware of the contents of the bales and had arranged to have them cleared at the request and on behalf of Rasu Prasad. He promised to point out to the Customs Superintendent the man Rasu Prasad for whom he said he was acting. The petitioner then took one of the Customs officers in a carriage from place to place for about two hours in the streets of Calcutta, but was not able to point out either Rasu Prasad or his place of residence. He was then made over to the Police and prosecuted with the result already stated. The Chief Presidency Magistrate has held that the story of Rasu Prasad is an invention; in support of this view, he has relied upon the circumstance that though the accused was given every opportunity by the Customs officers and by the Court to produce Rasu Prasad, he had not done so; and that, on the other hand, he had not been able to furnish any clue to the whereabouts of Rasu Prasad or even to give any satisfactory evidence of the existence of such an individual either at Calcutta or at Darjeeling. Much reliance, however, has been placed in this Court on a telegram to the following effect discovered at a search of premises No. 97 Mechua Bazar Street which is alleged to have been occupied by Rasu Prasad: "Rasu Prasad, Jubilee Sanitarium, Darjeeling. Borneo Shipment, Error. Reship. Porter."

This telegram appears to have been despatched from London on the 6th February, 1913, and was received at Darjeeling on the day following. It has been argued, with some plausibility, on the strength of this telegram, that the goods had been shipped by mistake, and that as soon as the mistake was discovered by the exporters, they cabled to the importer to reship the goods. In our opinion, reliance cannot be placed on the genuineness of this telegram, and it is unquestionably within the bounds of possibility that, if the cocaine was sought to be imported into this country in contravention of law, as soon as the discovery had been made on the 23rd January, the importer, whoever he might be, might cable to the exporters in London, using pre-arranged code words, to send a message of this description; it is by no means difficult to adopt such a method deliberately with a view to create evidence. The whole of the evidence has been placed before us, and we have allowed

the learned counsel for the petitioner to do so in a Revision case, because the matter, in our opinion, requires very careful scrutiny.

The facts unquestionably established may be thus summarised. The petitioner was in possession of an invoice and bill of lading, which purported to cover old wearing apparel exported by Porter & Co., of London to Rasu Prasad at Darjeeling: This bill of lading with endorsements by Porter & Co. and Rasu Prasad were made over by the accused to Cox & Co. in order that the goods might be cleared and passed through the Customs House. The goods were found to contain a large quantity of cocaine, which there can be no room for reasonable doubt, was sought to be illicitly exported in contravention of the provisions of the Excise Act. The accused, when apprised of the discovery, professed to be acting on behalf of Rasu Prasad. He was given every opportunity to produce Rasu Prasad or to give information about him. He has completely failed to give any clue about Rasu Prasad, the alleged importer, although his case is that he had met Rasu Prasad at Darjeeling and had on previous occasions cleared consignments on his account. From these circumstances, the Magistrate has drawn the inference that Rasu Prasad is a myth, and has held that the accused was in possession of the cocaine within the meaning of Clause (a) of section 46 as also of section 52 of the Bengal Excise Act. We are not prepared to hold that the accused was in "possession" of the cocaine. On behalf of the Crown reliance has been placed upon the cases of *Kashi Nath Bania v. Emperor* (1) and *Ashruf Ali v. Emperor* (2) in support of the view that the accused was in possession of the cocaine. The cases mentioned are in our opinion distinguishable. In the first of these cases, it was held that possession of a railway receipt, by the production of which the consignee might have obtained delivery and physical possession of the consignment, was possession within the meaning of section 9, clause (c) of the Opium Act, 1878. It was pointed out by the learned Judges that by the possession of the railway receipt, the consignee had dominion or control over the parcel in the sense that he could have passed the right to take delivery thereof to any other person; in other words, that possession need not be actual or physical but might be potential. In the later case, this view was questioned, though reluctantly followed, and it was pointed

CRIMINAL
1918.
Kali Oharan
v.
Emperor.
Mookerjee, J.

(1) (1905) I. L. R. 82 Calc. 557.

(2) (1909) I. L. R. 86 Calc. 1016.

CRIMINAL.

1918.

Kali Charan

v.
Emperor.

Mookerjee, J.

out that the decision overlooked the distinction between possession and right to possession. It is not necessary for our present purpose to examine the decisions in the two cases mentioned, but we may observe that the doctrine of constructive possession must be very cautiously applied, specially in the department of Criminal Jurisprudence. In the case before us, it cannot be said that the accused had dominion or control over the goods unless he was the real consignee, which he is not proved to be. We cannot hold that every person who might have possession of the bill of lading was in possession of the cocaine within the meaning of the Bengal Excise Act, irrespective of all other circumstances; if this view were not maintained, Cox & Co., and all their assistants who had handled the bill of lading, might be deemed to be in possession of the cocaine. In this view, the conviction of the petitioner under sections 46 and 52 of the Bengal Excise Act cannot be supported. We are clearly of opinion, however, that this is a case to which the provisions of sections 236 and 237 of the Criminal Procedure Code are applicable; on the evidence there is no doubt as to the facts, although it may be doubtful what precise offence the accused has committed on the facts alleged; he may consequently be convicted of the offence which he is shown to have committed although he was not charged with it. In this case, there is no room for controversy that an attempt has been made by the accused to import cocaine, that is to bring cocaine into Bengal in contravention of the provisions of the Bengal Excise Act. We feel no doubt whatever upon the evidence that he was aware of the character of the contents of the bales he had undertaken to clear and pass through the Customs House. Consequently, he is liable to be convicted of the offence of attempting to import cocaine in contravention of the Bengal Excise Act and to be punished under section 61 read with section 46, clause (a) and section 2 clause (12). We convict him accordingly and set aside the conviction as made by the Magistrate. There is no question that the sentence is appropriate. The accused must surrender and serve out the remainder of the term of sentence as imposed by the Magistrate.

A. T. M.

*Rule discharged: sentence affirmed;
conviction altered under Sec. 61.*

CRIMINAL APPEAL.

*Before Sir Asutosh Mookerjee, Knight, Judge,
and Mr. Justice Beachcroft.*

EMPEROR

v.

GAYA PROSAD.*

*Public prosecutor—Legal Remembrancer of Bengal, appeal by—Government of
Behar and Orissa—Acquittal, order of—Criminal Procedure Code (Act
V of 1898), Sec. 417.*

The mere fact that a person has been directed to present an appeal to the High Court from an order of acquittal does not involve his appointment as public prosecutor for the purposes of the case. In a case of this description, where the liberty of the subject is involved, and an appeal is sought to be preferred against an order of acquittal, the statute must be strictly construed, and full compliance with its provisions are required.

Appeal by the Government of Behar and Orissa.

The accused was tried by a Magistrate for an offence under section 193 of the Indian Penal Code and was acquitted by him under section 258 of the Code of Criminal Procedure. On the 2nd May 1913 this appeal was presented by Mr. J. Orr, the Deputy Legal Remembrancer of Bengal. A preliminary objection was taken to the competency of the appeal so presented.

Mr. B. C. Mitter (Standing Counsel) and Babu Jyotish Chandra Hazra for the Appellant.

Babu Manmotho Nath Mukerjee for the Accused.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the Government of Behar and Orissa under section 417 of the Criminal Procedure Code. The accused was tried by a Magistrate for an offence under section 193 of the Indian Penal Code and was acquitted by him under section 258 of the Criminal Procedure Code on the 7th November last. On the 2nd May 1913 this appeal was presented by Mr. J. Orr, the Deputy Legal Remembrancer of Bengal. A preliminary objection has been taken to the competency of the appeal so presented.

Section 417 provides that the local Government may direct the public prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. The term public prosecutor is

CRIMINAL.

1918.

July, 23.
August, 8.

August, 8.

* Government Appeal No. 4 of 1913, against the order of Moulvi Saïyed Abdul Eaijah, Deputy Magistrate, dated the 7th November, 1912.

CRIMINAL.

1918.

Emperor

v.

Gaya Prasad.

Mookerjee, J.

defined in clause (f) of section 4 of the Criminal Procedure Code, which lays down that public prosecutor means any person appointed under section 492 and includes any person acting under the directions of a public prosecutor and any person conducting a prosecution on behalf of Her Majesty in any High Court in the exercise of its original criminal jurisdiction. Section 492, to which reference is made in the definition, provides in sub-section (1) that the Governor-General in Council or the local Government may appoint, generally, or in any case or for any specified class of cases, in any local area, one or more officers to be called public prosecutor. In the matter of the appeal now before us Mr. Orr professes to act on behalf of the Legal Remembrancer of Bengal. It has not been suggested that Mr. Orr was appointed a public prosecutor either generally or for this special case by the Government of Behar and Orissa; nor has it been suggested that Mr. Orr was directed as a public prosecutor to present this appeal to the High Court. Consequently the authority of Mr. Orr, if any must be taken to be derivative; in other words, he can act as public prosecutor only under the direction of a person who has been appointed public prosecutor within the meaning of clause (f) of section 4. It has been pointed out to us on behalf of the Crown that on the 24th June 1886, a notification was published in the *Calcutta Gazette* to the effect that the Legal Remembrancer of Bengal was to be ex-officio public prosecutor in all cases before the High Court on its appellate side except in a case coming from a Presidency or other Magistrate in Calcutta. If this notification is read subject to the notification published in the Behar and Orissa Gazette on the 1st April 1912, the view may well be maintained that from that date the Legal Remembrancer of Behar and Orissa became ex-officio public prosecutor for that province. This proposition, however, is of no assistance to the Crown, because the present appeal has not been preferred by the Legal Remembrancer of Behar and Orissa. As already stated, the appeal has been presented under the direction of the Legal Remembrancer of Bengal. The question consequently arises whether the Legal Remembrancer of Bengal has been constituted public prosecutor for Behar and Orissa, either generally or especially for the purpose of the case before us. As there is no suggestion that the Legal Remembrancer of Bengal has been appointed public prosecutor generally for Behar and Orissa, the question narrows

down to this: Has the Legal Remembrancer of Bengal been constituted public prosecutor by the Government of Behar and Orissa for the case now before us. On behalf of the Crown it has been contended that he has been so appointed and in support of this position reference has been made to the letter addressed by the Secretary to the Government of Behar and Orissa in the Judicial Department to the Superintendent and Remembrancer of Legal Affairs of Bengal on the 23rd April 1913. The passage in the letter upon which reliance is placed is in these terms: "I am directed to request you to be so good as to file an appeal in the High Court on behalf of this Government under section 417, Criminal Procedure Code, against the order of Moulvi Saiyed Abul Hayat, Deputy Magistrate, improperly acquitting the accused in the marginally noted case on a charge of perjury." This passage in the letter no doubt authorises the Legal Remembrancer of Bengal to institute this appeal. But it does not appoint him public prosecutor within the meaning of section 492 of the Code of Criminal Procedure. On behalf of the Crown it has been urged that this sentence by implication appoints the Legal Remembrancer of Bengal as public prosecutor for the purposes of the case mentioned. In our opinion, the construction suggested cannot be reasonably put upon the passage. Section 417 of the Code of Criminal Procedure lays down that the local Government may direct the public prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. The direction must be given to a public prosecutor. Be it conceded that the direction may be given in a letter whereby the public prosecutor is appointed as such; yet it does not follow that the mere fact that a person has been directed to present an appeal to the High Court from an order of acquittal involves his appointment as public prosecutor for the purposes of the case. Indeed, in view of the fact that the province of Behar and Orissa has a Legal Remembrancer, it is extremely improbable that the Legal Remembrancer of Bengal could ever have been intended to be appointed public prosecutor in a case from that province. In a case of this description, where the liberty of the subject is involved, and an appeal is sought to be preferred against an order of acquittal, the statute must be strictly construed, and full compliance with its provision required. The learned Standing Counsel has urged us to put upon the passage in the

CRIMINAL.

1918.

Emperor

Gaya Prasad.

Mookerjee, J.

CRIMINAL.

1918.

Emperor

v.
Gaya Prasad.

Mookerjee, J.

letter what he calls a reasonable and common sense construction ; but it is plain that the construction which he has pressed us to adopt was never present to the mind of the framer of the letter and that he has been constrained to take recourse to this argument because there is no escape from the preliminary objection. We hold accordingly that the appeal is incompetent and dismiss it on that ground.

A. T. M.

Appeal dismissed.

CRIMINAL REFERENCE.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

EMPEROR

v.

TARAPADA NASKAR.*

CRIMINAL.

1918.

August, 6.

*Reference, validity of—'Opinion of the jury'—Criminal Procedure Code (Act
V of 1898), Sec. 307, cl (c)*

The expression "opinion of the Sessions Judge and of the jury" in clause (c) of section 307 of the Code of Criminal Procedure, is equivalent to "opinion of the Sessions Judge and verdict of the jury."

Emperor v. Challen (1) dissented from.

Reference under section 307 of the Code of Criminal Procedure.

The accused Tarapada was charged with an offence punishable under section 302 of the Indian Penal Code, in that he committed murder by intentionally causing the death of one Jahar Ali. The jury returned a unanimous verdict of not guilty. The Sessions Judge made this Reference, as he had not been able to agree with the verdict of the jury and as in his opinion the Reference was necessary for the ends of justice.

Babus Monmotho Nath Mukerjee, Herambo Chandra Guha and Nirmal Chunder Chunder for the Accused.

Mr. Orr for the Crown.

The judgment of the Court was delivered by

August, 6.

Mookerjee J.—This is a Reference under section 307 of the Code of Criminal Procedure. The accused Tarapada Naskar was charged with an offence punishable under section 302 of the Indian Penal Code in that he committed murder by intentionally

* Criminal Reference No. 17 of 1918 under Section 307 of the Code of Criminal Procedure.

(1) (1903) I. L. B. 39 Mad. 91.

causing the death of one Jabar Ali. He was tried along with his brother Mannoo Naskar who was charged with an offence punishable under section 302 and 114 of the Indian Penal Code. The jury returned a unanimous verdict of not guilty. The Sessions Judge, with some hesitation, accepted the verdict in respect of Mannoo Naskar and acquitted him. But as regards Tarapada Naskar the Sessions Judge has made this Reference, as he has not been able to agree with the verdict of the jury and as in his opinion the Reference is necessary for the ends of justice.

A preliminary objection has been taken on behalf of the accused, that the Reference is not in order, inasmuch as the Sessions Judge did not ascertain the *opinion* of the jurors. In support of this contention reference has been made to the judgment of Mr. Justice Davies in the case of *Emperor v. Challan* (1) and to the decision of this Court in the case of *Emperor v. Annada Charan Thakur* (2).

The first sub-section of section 307 lays down that if in a case tried before the Court of Sessions and a Jury, the Judge disagrees with the verdict of the jurors or of a majority of them, on all or any of the charges on which the accused has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and when the verdict is one of acquittal, stating the offence which he considers to have been committed. Sub-section (3) then provides that in dealing with the case so submitted, the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto, it shall, after considering the entire evidence and after giving due weight to the *opinions* of the Sessions Judge and the jury, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and if it convicts him, may pass such sentence as might have been passed by the Court of Sessions.

It has been argued on behalf of the accused that in order that the High Court may properly discharge its duties under sub-section (3) of section 307, the *opinion* of the jurors must be ascertained, and that such opinion is distinct from the *verdict* of the jurors or of a majority of the jurors as mentioned in sub-section (1)

CRIMINAL,

1918.

Emperor

v.

Tarapada,

Mookerjee, J.

(1) (1906) I. L. R. 29 Mad. 91.

(2) (1909) I. L. R. 86 Cal. 699, 9 C. L. J. 688.

CRIMINAL

1918.

Emperor

v.

Tarapada.

Mookerjee, J.

of section 307. The reasons in favour of this argument are put forward most strongly in the opinion of Mr. Justice Davies to which reference has been made. The duty of the High Court under sub-section 3 of section 307 of the Criminal Procedure Code "is not only to consider the entire evidence, but also to give due weight to the opinions of the Sessions Judge and of the jury. The opinions of the jury cannot mean their verdict, for that is not a mere opinion not is it styled as such as the opinions of assessors are. The verdict is a final judgment by the jury as to the guilt or otherwise of the persons charged before them, and it is binding on the Judge, while 'opinions' are not so. Besides, it is obvious from the provisions of the Code that the opinions of the jury referred to in clause (3) of section 307 are to be on the same par as those of the Judge, that is, opinions given after the verdict, for the jury are not enabled to pass opinions before their verdict. It is not until after the verdict is delivered and the Judge disapproves of it, that the jury's opinions are required for submission to this Court to be considered along with the Judge's opinions." With all respect, we are not prepared to accept this view of section 307, and, in our opinion, the expression "opinion of the Sessions Judge and of the jury" is equivalent to "opinion of the Sessions Judge and verdict of the jury." No doubt, as pointed out by this Court in the case of *Emperor v. Annada Charan Thakur* (1), after the jury have returned their verdict, and after the Judge has stated that he will not accept the verdict, it may be desirable to ascertain the grounds of their verdict. But it must be remembered that there is no express provision in the Code for ascertaining the opinion of the jury. It is further worthy of note that in the case of *Emperor v. Annada Charan Thakur* (1) the learned Judges stated that they were not prepared to hold that the omission to ascertain from the jurors the ground for their verdict would vitiate the Reference. We may add that if the contention of the accused were accepted, practical difficulties of a grave character might arise. The Judge would have, in that view, to ascertain the opinion of each individual juror in respect of each of the various points which might arise in a case and the result might be divergent reasons assigned by five different persons upon each of the points for consideration. Such a collection of diverse opinions can hardly be expected to be of any real assistance to this Court. We hold accordingly that the Reference before us is in order.

(1) (1909) I. L. B. 38 Calo, 629.

CRIMINAL.

1918.

Emperor

v.

Tarapada.

Mookerjee, J.

As regards the merits of the case, we feel no doubt whatever that the accused Tarapada did cause the injuries to Jahar Ali, of which he ultimately died. This view is amply supported by the testimony of eyewitnesses, as also by two statements made by the deceased, one immediately after the occurrence, and, the other, on the day following and a few hours before his death. The occurrence took place in broad daylight on the afternoon of the 13th April last. Witnesses, whom there is no reason to distrust, state that they saw the accused Tarapada Naskar stab the deceased Jahar Ali with a knife. On his way to the hospital Jahar Ali stated that he had been stabbed by Tarapada; and on the following day when his dying declaration was recorded, he repeated that statement. But it has been urged that the witnesses examined on the side of the prosecution have not disclosed the manner in which the occurrence happened, and that they have given an untrue account of the origin of the quarrel. It may be conceded that some of the statements made by witnesses examined on behalf of the prosecution are open to comment. Yet, in our opinion, there is a substratum of truth in that evidence, and as already stated we feel no doubt that the accused caused those injuries to Jahar Ali which led to his death. At the same time, we are not prepared to hold that the accused should be convicted under section 302 of the Indian Penal Code. Immediately after the occurrence the brother of the accused gave information to the police and described what had happened. According to his statement, he saw one Alia Khan on the top of their cocoanut tree and Bakar Khan and Jahar Ali, the deceased, standing under the tree. The result was that there was a quarrel and the present accused, as the evidence on the side of the prosecution shows, stabbed Jahar Ali. In view of this circumstance and also in view of the fact that the accused is only 17 years of age, we think that a comparatively light sentence may be passed.

The result is that we set aside the verdict of the jury as regards the accused Tarapada Naskar, convict him under section 304 of the Indian Penal Code, and sentence him to rigorous imprisonment for six years.

A. T. M.

Conviction under Sec. 304 I. P. C.

APPELLATE CIVIL.

*Before Sir Harry Lushington Stephen, Knight, Judge
and Mr. Justice Mullick.*

RANI HEMANTA KUMARI DEBI AND OTHERS

v.

CIVIL.

1918.

May, 13, 14, 15, 16.
June, 2.

MAHARAJA JAGADINDRA NATH ROY BAHADUR.*

Regulation I of 1801, Secs. 8, 14—Regulation VIII of 1793, Sec. 5—Regulation I of 1793, Sec. 10—Petition for separation of a taluk from the estate in 1799 and 1801, if can be given effect to in 1908—Fresh application, whether entertainable—Limitation—Order sought to be enforced, more than 100 years old—Laches, if any—Century of litigation between parties whether kept application pending—Board of Revenue, decision of, whether final—Civil Court, jurisdiction of.

Upon an application having been made to the Collector of the district by the proprietor of a *taluk*, within the time prescribed under section 14 of Regulation I of 1801, for its separation from the *samindari*, it was ordered, by a judgment of the Sudder Dewani Adalat, dated the 14th August, 1805, under the said Regulation and Regulation VIII of 1793 that the *taluk* should be separated from the estate, and that the Collector should deduct the *jama* of the *taluk* from that of the *samindari*. Owing to a dispute, to the title of the *taluk*, a partition of the parent *samindari*, a suit for the assessment of revenue in respect of *char* lands, certain resumption proceedings, and various other causes, the order was not carried out. And the matter was commenced by a petition dated 19th February, 1853, praying that the *taluk* might be separated on a specified *jama*. The application for separation was "rejected" by the Collector, and the "suit" was "struck off," on an objection being made by the Collector of another district acting as the Court of Wards on behalf of the *samindar*, on the grounds that though the *samindar* raised an objection as to limitation, separation could not take place till pending suits were decided and the lands kept *patit* were enquired into. On the 25th April, 1854, the Commissioner refused to interfere and rejected the application. The *talukdar* again applied in March 1906 to have his *taluk* separated and to have the *jama* assessed, and explained his delay in making the application by the fact that several litigations were on foot affecting the assets of the *samindar* and by such other several causes. The Board of Revenue eventually ordered on the 18th April, 1909, that a separation should take place at a certain specified *sadar jama*. Upon a suit being brought by the *samindar* for setting aside the order of the Board :

Held, that the order of 1854 was not a final adjudication on the original application for separation, and that the proceedings commenced in 1906 was in order, and the *samindar* had no cause to suppose that the *talukdar* had abandoned his rights, inasmuch as the reasons adduced by the latter for not having put forward his claims to separation before 1906 clearly showed that he did not sleep on his rights.

* Appeal from Original Decree No. 271 of 1910, against the decision and decree of Babu Satya Oharan Ganguli, Subordinate Judge, 3rd Court of Mymensingh, dated the 29th March, 1910.

Held also, the civil Court has jurisdiction to interfere with the decision of the Board of Revenue in matters relating to the assessment of the *jama* of a separate *talug* only in cases when the method followed by the Board was not according to law, and the Board acted without jurisdiction; but it has none to interfere in matters relating to details to adjudicate on which the Board certainly had jurisdiction.

Appeal by the Plaintiffs.

Suit for declaration that *talug* Balasuti Digor belonging to the defendant has become a dependent *talug* by operation of law, that the *talug* cannot be detached from the plaintiff's estate known as *pergana Pakhuria* to form a separate estate, that the Revenue Board's order about the separation of the *talug* is *ultra vires*, and that the *talug* cannot be separated from the estate at the *sadar jama* specified by the Board unless the *jama* is assessed in proportion of its actual produce and by reference to the actual produce of the estate and the revenue payable thereof if the Court finds that the *talug* can be separated from the estate of the plaintiffs.

Dr. Rash Behary Ghosh, Babus Kishori Lal Sarkar, Jogesh Chandra Roy, Debendra Nath Bagchi, Priya Sankar Majumdar, Bepin Behary Ghose, Bidhu Bhushan Ganguly and Ramani Mohan Chatterjee for the Appellants.

Mr. S. P. Sinha, Babus Dwarka Nath Chuckerbutty, Rama Kanta Bhattacharjee and Jotindra Nath Lahiri for the Respondents.

C. A. V.

The judgment of the Court was delivered by

Stephen J.—This appeal arises out of a suit in which the plaintiff seeks relief in respect of an order passed by the Revenue Board of Eastern Bengal and Assam relating to a matter that was commenced about one hundred and ten years ago. There is no dispute as to the facts of this case which are chiefly decrees and other official acts. They have been very fully set out, though from rather a different point of view than that from which we must consider them, by this Court in March 1890, and those which we more particularly have to deal with have been clearly and correctly related by the Officiating Collector of Mymensingh in his order of the 8th April 1908. It will therefore be enough for us to mention the facts of the case, only so far as they affect the two points that have been raised before us. They are as follows. By a judgment of the Sudder Dewani Adalat, dated the 14th of August 1805 it was ordered unde

ORIEL

1918.

Hemanta Kumari

Jagadindra Nath.

June, 2.

CIVIL.

1918.

Hemanta Kumari

v.
Jagadindra Nath.

Stephen, J.

Regulation VIII of 1793 and Regulation I of 1801, that a *taluk* known as Taraf Balasuti Digor should be separated from an estate known as pergana Pakhuria, and that the Collector should deduct the *jama* of the *taluk* from that of the zamindari. For a variety of causes, this order was not carried out; among them were a dispute to the title of the *taluk*, a partition of the parent zamindari, a suit for the assessment of revenue in respect of char lands, and apparently some resumption proceedings. With these we are not immediately concerned; but they terminate with an order of the Commissioner of Dacca, dated the 25th April 1854 by which an application that the *taluk* may be carved out on a named *jama* was refused. The effect of this order is the first question we have to decide, and we need not therefore consider it more fully at present. After it was made the question of the separation of the *taluk* was not brought forward again till 1906. This delay is explained, whether or not it is justified by the fact that the claim for enhancement of the rent of certain dependent *taluks* which affected the assets of the zamindari was not finally decided till 1879; that till 1882 the *talukdar* was an infant, that in 1882 the zamindar brought a suit for the enhancement of the rent of the *taluk*, which was not finally decided till 1894, and that from 1894 to 1906, other litigation was on foot between the present parties. Under these circumstances the *talukdar* applied in March 1906 to have his *taluk* separated and to have the *jama* assessed. And after the matter has been considered by the Collector of Mymensingh and the Commissioner of Dacca, the Board of Revenue eventually ordered on the 16th April 1909 that separation should take place, at a *sadar jama* of Rs. 17,460 odd. The zamindar, then brought the present suit, in which he prays for declarations (1) that Taluk Balasuti cannot be separated from his zamindari, and that the Board's order of the 16th April 1909 is *ultra vires*; and (2) that if it can be so separated it cannot be separated at the *jama* named, unless that *jama* is assessed according to law, which he says it has not been. The plaintiff originally prayed for a declaration that the *taluk* had become a dependent *taluk*; but this point was not pressed before us. The suit was dismissed in the Court below and the plaintiff now appeals.

Two points have as we have said been argued before us.

They are that the Board of Revenue acted without jurisdiction (1) in making an order in 1906 when the only

application on which it could have been made was finally disposed of in 1854, and (2) in assessing the *jama* at a sum which has not been arrived at according to the method described in Reg. I of 1793, section 10 and Reg. I of 1801, section 8.

As regards the first point it is not disputed that the *taluqdar* of *talug* Balasuti, the predecessor in interest of the defendant made an application for the separation of the *talug* from Pakhuria in accordance with the Regulations that apply to the case and especially within the period of limitation provided for such application by section 14 of Reg. I of 1801, namely, within one year of the date of that Regulation. The question is, was that application finally disposed of in 1854? because if it was, it was not open to the defendant to make a new application, on account of the period of limitation we have just mentioned, and consequently the order of the Board was made without jurisdiction. To decide this we must consider the circumstances under which the order came to be made. The matter was commenced by a petition of the 19th February, 1853, by Jadab Chandra Sarma Roy, who was then entitled to the *talug*. In this he recites the order of the Sadar Dewani Adalat of 1805 for assessment and separation of the *talug*, the purchase of a four annas share of Pakhuria by Government, an order of the 27th December, 1839 by the Commissioner that the order of the Sadar Dewani Adalat should be executed at the time of the partition of the zemindari that was then proceeding, and a subsequent order of the 27th July, 1849, that the separation should be postponed till the decision of enhancement suits relating to all the *talugs* in the pergunah then pending in the civil Court, and of a suit for assessment of revenue brought by Government in respect of some char lands and also until the completion of an enquiry whether certain Mahal lands had been improperly kept *patit*: and concludes by praying that the *talug* might be separated on a specified *jama*. The application was opposed by the Collector of Rajshahaye, acting as the Court of Wards on behalf of the zemindari, on the ground that separation should not take place till pending suits were decided. On this the Collector of Mymensigh ordered that the "application of the petitioner for separation be rejected, that the suit be struck off, and the papers be kept on the file as disposed of." The grounds for this order are that though the zemindar raised an objection as to limitation, separation could not take place unless the suits for

CIVIL.

1918.

Hemanta Kumari

v.

Jagadindra Nath,

Stephen, J.

CIVIL.

1918.

Hemanta Kumari

v.

Jagadindra Nath.

Stephen, J.

enhancement were disposed of and the lands kept *patit* enquired into; it was therefore only necessary to consider whether the orders of the Commissioner to this effect had been carried out. Also suits for enhancement were still pending. On the matter coming before the Commissioner of Dacca, he found no reason to interfere with the Collector's order, and therefore ordered "that the application of the petitioner be rejected." We find it impossible to regard these two orders as a final adjudication on the original application for separation. The original petition sets out the reasons for which the final execution of the order of forty-eight years before had been recently delayed; the orders do not concern themselves with any other matters, which except a point of limitation is not decided, and on which it seems that the application could not have been dismissed. It is true that the Collector's order is that the application be rejected and the suit struck off, which is in terms a final decree. The Commissioner's order however is only that the application of the petitioner be rejected, language which is as consistent with a postponement of the main matter as it is with a final adjudication. The orders in question have twice attracted the notice of superior Courts. This Court in dealing with the last enhancement suit in 1890 says, "the *talukdar* in 1853 made another attempt to get separation, but the Collector finding that some suits were still pending before the Special Commissioner rejected the application" and the order was upheld by the Commissioner. The Privy Council in the same suit say that the proceedings were carried on till 1854, "when they came to an end, not in consequence of the right of the predecessor in title of the respondent (the *talukdar*) to a separation being disputed, but because of the intervention of the Government." This seems to show conclusively that the rights of the *talukdar* were not finally adjudicated on, because they were not disputed. The intervention of the Government, represented in this matter by the Court of Wards, could not determine the *talukdar's* rights, though it might have the effect of inducing him to abandon them, and we cannot consider that their Lordships meant more than that he had in fact abandoned them, which at that time might well be supposed to be the case.

We hold therefore that the original application was not disposed of in 1854: and as the only period of limitation applicable its hat contained in section 14 of Reg. I of 1801 that we

have already noticed, the proceedings commenced in 1906 seem to have been in order. Had the *taluqdar* slept on his right for fifty years the Court would possibly be prepared to assume that he had abandoned rights which he had not tried to enforce, and not to allow him to enforce them against a man who might have had good reason to suppose that they were abandoned. In the present case however the *taluqdar* has, as we have indicated, adduced reasons for not having put forward his claim to separation between 1854 and 1906; and we can not consider that the present appellant had any cause to suppose that he had abandoned anything. The order that the respondent sought to enforce in 1906 was then more than a hundred years old, but it had been followed by nearly a century of litigation between the parties to this suit and their predecessor. This brings us to the second point that we have to consider which is, as we have said, whether the Board has acted without jurisdiction in assessing the *jama* of the separated *taluk* at a sum which has not been arrived according to the method prescribed by law. The law in question is contained in section 10 of Reg. I of 1793, and section 8 of Reg. I of 1801; the latter of which is practically a repetition and amplification of the former. Its chief provisions as far as we are concerned are as follows: "The assessment upon the portion of the estate to be separated shall bear the same proportion to its actual produce as the fixed assessment upon the whole estate may bear to its actual produce." Actual produce is the net annual rent or other produce receivable by the proprietor: it is to be ascertained from Patwarry accounts, and if they are not to be trusted then from any separate accounts there may be of the zamindari and the mahal for three years past, provided that the officer concerned "shall adopt every authorised measure to obtain the most accurate accounts procurable," and see that the accounts from which he computes net produce are sufficiently accurate to prevent any risk to Government. The first point, that arises on these enactments is that the description of actual produce does not specify the time of the production of the produce in question. Actual produce of course means produce that has been or is being realised: but in the present case, are the Board to look to the produce at the time of the original application in 1802, or of the final order in 1909, or at any time between these two dates? The question is a simple one, though the answer is not obvious. It has to be decided on first impression but it is one which the Board of Revenue has jurisdiction to decide. They have decided that the time to be looked to is, as we understand either 1802 or 1806, at both of which dates the actual produce of the *taluk*

CIVIL.

1913.

Hemanta Kumari

Jagadindra Nath

Stephen, J.

CIVIL

1913.

Hemanta Kumar

v.

Jagadindra Nath.

Stephen, J.

seems to have been the same ; this may in fact be a wrong decision but that fact alone gives us no jurisdiction to interfere in the matter, as we are considering only whether the Board acted within its jurisdiction in arriving at it. And we hold that it did.

It then remains for us to consider whether the Board arrived at the amount of Rs. 17,460 in the mode prescribed by the Regulation. The method they followed is very clearly described in the order of the Board of Revenue of the 23rd March, 1909, and we see no reason to doubt that the surmises therein contained as to the course of business between the Collector and Board before and after 1808, are as nearly an accurate account of what happened as it is now possible to get. Exhibit F, an account of the rent of the *talug*, which appears to have been sent by the Collector to the Board was not before the Board at the time the order of 1909 was made ; but as its contents only go to strengthen the conclusion arrived at, this is of no immediate importance. In this view of the facts of the case the Patwari papers and separated accounts of the *talug* and the present *estâté* were not to be had, but the Board considers that the figure of Rs. 17,460 which represented as Rs. 14,006 (*sicca*) was one of the amounts suggested to the Board as the possible assessment of the *talug*, was originally derived from village papers. This conclusion is again one which, after hearing the arguments addressed to us on the subject we see no reason for doubting. And if it is accepted we consider that the Board has, in the words of the Regulation, "adopted every authorised measure to obtain the most accurate accounts possible" and that if there is any inaccuracy in them it is not likely to cause any loss to the Government. The method followed by the Board was therefore according to law, and the conclusion they arrived at, lay within the bounds of their jurisdiction. It is argued before us that the Board have not made a proper allowance in respect of *rassad*, which is represented to us as a liability of the *taluqdar*. On the other hand it is represented as an exemption merely. It is also said that the Board have not made proper allowance in respect of amounts payable for the police. These matters however are details on which the Board certainly had jurisdiction to adjudicate, and on which we have none to interfere with their decision.

We hold therefore, that the Board acted within their jurisdiction throughout this matter. Consequently the appeal fails and is dismissed with costs.

A. N. R. C.

Appeal dismissed.

CIVIL RULE.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

RADHASYAM KAR

v.

DINOBUNDHOO BISWAS.*

*Sale, setting aside of—Bengal Tenancy Act (VIII of 1885), Sec. 174—
Application, time for, if can be extended—Fraud of execution-creditor—
Limitation Act (IX of 1908), Sec. 18—Jurisdiction.*

As section 18 of the Indian Limitation Act has no application to a proceeding under section 174 of the Bengal Tenancy Act, a judgment-debtor cannot get an extension of time for filing application for setting aside of sale under the said section of the Bengal Tenancy Act, on the ground of fraud on the part of the execution-creditor.

When a sale has taken place and no ground has been established for its reversal in accordance with statutory provisions, there is only one duty incumbent upon the Court, namely, to confirm the sale in so far as the parties to the proceeding and the auction-purchaser are concerned, and, if the Court, under these circumstances, refuses to give effect to the sale, it fails to exercise a jurisdiction vested in it by law, namely, to confirm the sale, and, exercise a jurisdiction not vested in it by law, namely, to cancel a valid and operative sale.

Birj Mohan v. Rai Uma Nath (1) followed.

Application for revision by the Auction-purchaser.

In execution of a decree for arrears of rent, the disputed holding was sold on the 29th November, 1912 and was purchased by the petitioner, a third person. On the 7th January, 1913, the judgment-debtor applied under section 174 of the Bengal Tenancy Act for reversal of the sale. The judgment-debtor explained the delay on two grounds: namely, *first*, poverty on his own part, and *secondly*, fraud on the part of the execution-creditor. The Court below set aside the sale.

Babus Atul Krishna Roy and Lalit Mohon Chatterjee for the Petitioner.

* No one appeared for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee J.—We are invited in this Rule to set aside an order made under section 174 of the Bengal Tenancy Act. In execution of a decree for arrears of rent, the disputed holding was brought to sale on the 29th November 1912 and was pur-

* Civil Rule No. 175 of 1913, against an order of Moulvi N. Hug, Deputy Collector of Kendrapara, dated the 7th January, 1913

(1) (1892) I. L. R. 20 Cal. 8.

CIVIL.

1913.

May, 12, 13.

May, 13

CIVIL.

1918.

Radhasyam

v.

Dinobundhoo.

Mookerjee, J.

chased by the petitioner who was a stranger to the proceeding. On the 7th January 1913 the judgment-debtor applied under section 174 of the Bengal Tenancy Act for reversal of the sale. This application, on the face of it, was made more than 30 days after the sale had taken place. The judgment-debtor explained the delay on two grounds; namely, *first*, poverty on his own part, and, *secondly*, fraud on the part of the execution-creditor, by reason of which, he alleged, he had been kept ignorant of the sale. The Court did not give notice of this application either to the decree-holder or to the auction-purchaser, but set aside the sale. The Deputy Collector observed that although the application had been made after the expiry of the prescribed period, yet in the circumstances of the case, it was just that the application should be entertained and allowed. He was evidently moved by the poverty of the petitioner and considered that there was no hardship on the auction-purchaser who would get his money back with interest, or on the landlord who would get his tenant back.

The auction-purchaser now invites this Court to set aside the order as made without jurisdiction. There can in our opinion be no room for controversy that the order must be deemed to have been made without jurisdiction, unless it can be held that the Court below had authority to extend the time prescribed by section 174 of the Bengal Tenancy Act. It was pointed out by their Lordships of the Judicial Committee in the case of *Birj Mohun Thakur v. Rai Uma Nath* (1), that when a sale has taken place and no ground has been established for its reversal in accordance with statutory provisions, there is only one duty incumbent upon the Court, namely, to confirm the sale in so far as the parties to the proceeding and the auction-purchaser are concerned, and, if the Court, under these circumstances, refuses to give effect to the sale, it fails to exercise a jurisdiction vested in it by law, namely, to confirm the sale, and, exercise a jurisdiction not vested in it by law, namely, to cancel a valid and operative sale. The only question which consequently requires consideration is, whether upon the facts stated in the petition, assuming these facts to be established, the Court below had authority to extend the time.

The judgment-debtor alleges that the entire execution proceedings have been fraudulent and that in substance he has been kept out of the knowledge of the sale, and, consequently,

(1), (1892) I. L. R. 20 Calo. 8,

of his right to have the sale set aside within the period prescribed by law. This in substance is an allegation that the judgment-debtor is entitled to the benefit of the provisions of section 18 of the Indian Limitation Act. But that section is clearly inapplicable to the case before us. Read with section 3 of the Indian Limitation Act of 1908, section 18 merely provides that every application made after the period of limitation prescribed therefor by the first schedule to the Indian Limitation Act of 1908, shall be dismissed, unless facts are established to attract the operation of section 18. In the case before us, however, the period of limitation is not prescribed by the first schedule to the Indian Limitation Act. There is this further difficulty that clause (b) of sub-section 1 of section 29 of the Indian Limitation Act of 1908 provides that nothing in the Act shall affect or alter any period of limitation specially prescribed for any application by any special or local law now or hereinafter in force in British India. Consequently section 18 by itself has no application to a proceeding under section 174 of the Bengal Tenancy Act. This view is in accord with the principle recognised in the cases of *Girija Nath Roy Bahadur v. Palani Bibee* (1) and *Akhoy Kumar Soor v. Bejoy Chand Mokatap* (2).

The only other point which requires consideration is, whether there is any provision in the Bengal Tenancy Act which authorises the Court to extend the time prescribed by section 174. The only provisions in the Bengal Tenancy Act relevant to this subject are contained in sections 184 and 185. Section 184 provides that the limitation applicable to certain specified suits, appeals and applications are to be found in the third schedule annexed to the Act. Sub-section (1) of section 185 excludes the operation of sections 7, 8 and 9 of the Indian Limitation Act of 1877 to suits and applications mentioned in section 184. Sub-section 2 of section 185 then lays down that, subject to the provisions of Chap. XVI of the Bengal Tenancy Act, the provisions of the Indian Limitation Act shall apply to all suits, appeals and applications mentioned in section 184. The application with which we are now concerned was made under section 174, and, is not an application mentioned in the third schedule to the Bengal Tenancy Act. Consequently sub-section (2) of section 185 is of no assistance to the applicant under section 174. The position, therefore, is that notwithstanding the fraud alleged by the petitioner, he is not entitled

CIVIL.

1918.

Radhasyam

v.
Dinobundhoo.

Mookherjee, J

(1) (1889) I. L. B. 17 Calo. 268.

(2) (1902) I. L. B. 22 Calo. 818.

CIVIL.
1918.
Badhasyam
v.
Dinobondhoo.
Mookerjee, J.

to protection under section 18 of the Indian Limitation Act. Whether he had any remedy under Rule 90 of Order 21 of the Code of 1908 read with section 18 of the Indian Limitation Act of 1908, it is needless to consider now; nor is it necessary to consider whether he may still have a remedy by a regular suit, if the proceedings are fraudulent as alleged by him. On the present application, we are constrained to hold that the order of the Court below was made without jurisdiction.

The Rule is made absolute and the order of the Court below discharged. The sale will stand confirmed. There will be no order for costs either in this Court or in the Court below.

A. T. M.

Rule made absolute.

*Before Sir Herbert Carnduff, Knight, Judge, and
Mr. Justice Chapman.*

ICHHAMAYI AND OTHERS

v.

KAILAS CHANDRA MUKERJEE AND OTHERS.*

CIVIL.
1918.
January, 16.

Hindu widow executing permanent lease—Lease declared invalid—Lessee, if can acquire occupancy right—Raiyat claiming to hold at a fixed rate, if can claim occupancy right.

A person who claims the higher status of a raiyat at fixed rate can, if that claim is disallowed, fall back upon and establish, if he can, the lower status of an occupancy raiyat.

Where, therefore, a permanent lease was granted by a person, who had only a life interest in the land, and the lease was afterwards declared invalid, the lessee having been in possession for more than 12 years, although he claimed to be a raiyat holding at a fixed rate, could acquire the lower right of a mere occupancy raiyat.

Bhat Nath Naskar v. Surendra Nath Dutt (1) distinguished.

Appeal by the Plaintiffs.

The suit was brought for recovery of possession of certain plots of land and for declaration of title thereto upon setting aside a permanent lease granted by one Bama Sundari (sister of the original plaintiff) who had only a life interest in the said lands. The original plaintiff being dead, the present plaintiffs were substituted in her stead. Defendants pleaded *inter alia* that the lease was a valid one, and that at any rate they could not be

* Appeal from Appellate Decree No. 1489 of 1909, against the decree of B. C. Mitter, Esq., District Judge of Murshidabad, dated 24th March, 1909, reversing that of Babu Annoda Promod Majumdar, Munsiff, 2nd Court at Jangipur, dated 9th March, 1908.

(1) (1909) 11 C. L. J. 98; 18 C. W. N. 1026.

evicted inasmuch as they were in possession of the lands for more than twelve years and had acquired an occupancy right therein.

Babu Gobinda Chandra Dey Roy for the Appellants.

Babu Tarak Chandra Chuckerbutty for the Respondents.

The judgment of the Court was as follows :

This appeal is preferred against the decision of a suit brought by a Hindu widow for recovery of possession of certain plots of land and for declaration of title thereto. The original plaintiff is now dead, and the appellants before us are her sons, who have been substituted in her stead.

It appears that the defendants were in possession under a permanent lease, which was granted to them in the month of March, 1873, by one Bama Sundari, the sister of the original plaintiff. It has been held that Bama Sundari had only a life-interest in the land, and that the permanent lease granted by her to the defendants was invalid, and that decision has not been assailed. The lower appellate Court, however, found that the defendants had nevertheless acquired an occupancy right, they having been in possession for more than twelve years, and that they were, therefore, not liable to be evicted.

The principal point taken before us is that, as the defendants claimed to be raiyats holding at fixed rates, they could not acquire the lower rights of mere occupancy raiyats, and in support of this contention, reliance is placed on the decision of this Court in *Bhut Nath Naskar v. Surendra Nath Dutt* (1), which was a Letters Patent Appeal but a reference to that case, and especially to the judgment of the learned Chief Justice in it, makes it quite clear that the decision is no authority whatever for the proposition,—to our minds a startling one—that a person who claims the higher status of a raiyat at fixed rates, can not, if that claim is disallowed, fall back upon and establish, if he can, the lower status of an occupancy raiyat. Moreover, the arguments which were put forward by two of the learned Judges in that case and on which the appellants rely, proceeded, not upon general principles, so far as we can see, but upon the special provisions and framework of the Bengal Tenancy Act of 1885. But the permanent lease with which we are here concerned, was, as we have observed, granted in March 1873; the Bengal Tenancy Act did not come into force till the 1st November 1885; and thus it would seem that the occupancy right which the defendants are said to have acquired under

CIVIL.

1912.

Ishhamay

Kailas Chandra.

January, 18.

CIVIL.

1918.

Ichhamayl

v.

Kallias Chandra.

the former law is saved by the special provisions of section 19 of the Act of 1885. That being so, the case is still less an authority on the point now before us, and we have no hesitation in saying that, in our view, the learned District Judge was right.

There remain two smaller points relating to two specific parcels of land included in the land in suit. First, as regards a plot of 6 cottas, it is contended that, as that was purchased by one of the defendants from the original plaintiff, the appellants are entitled to it as her reversionary heirs. Now, it seems to us quite clear that the appellants, who stand in the shoes of the original plaintiff cannot in this suit, set up any such right. Their cross-appeal in respect of this plot of land was, therefore, rightly dismissed as being without substance.

The second plot referred to is one of 11 cottah, and it is contended that, as this plot was purchased by one of the defendants from Rajabulluv, a *lakherajdar*, and the plaintiffs do not question the *lakheraj* right of Rajabulluv and his transferee, they ought to be given a declaration as to their tenant right in the plot. As regards this, all we need say is that this was not the case set up by them in their cross-appeal, in which the *lakheraj* right of Rajabulluv was expressly derived. We cannot, therefore, listen to this contention now.

The result is that this appeal is dismissed with costs.

A. N. R. C.

Appeal dismissed.

*Before Sir Harry Lushington Stephen Knight, Judge and
Mr. Justice Mullick.*

NAWAB SIR SALIMULLAH BAHADUR AND OTHERS

v.

SAINADDI SARKAR AND OTHERS.*

CIVIL.

1918.

June, 11.

*Limitation—Decree, execution of—Civil Procedure Code (Act V of 1908),
Order XXI, Rule 17—Application to file a list of immovable properties—
Permission to file—No time fixed by Court—Petition for execution, not
amended within the period of limitation—Execution proceedings whether
barred.*

A decree-holder made an application for execution of his decree, and before the period of limitation had arrived he applied to the Court under Order XXI, Rule 17 of the Code of Civil Procedure to be allowed to file a list of immovable properties. The Court simply made the order "permitted," and did not fix

* Appeal from Appellate Order, No. 342 of 1911, against the order of A. H. Cumming, Esq., District Judge of Tipperah, dated the 24th April, 1911, modifying that of Babu Satkari Halder, Subordinate Judge, 1st Court, of that District, dated the 21st November, 1910.

any time within which the list was to be filed. The list was subsequently filed after the period of limitation had already run :

Held, that the proceedings in execution were barred by limitation, inasmuch as the provisions of Order XXI, Rule 17, Sub-Rule (2) were not complied with and the necessary formalities were not carried out within the time prescribed by law.

Appeal by the Decree-holders.

Application for execution.

The facts will appear sufficiently from the judgment.

Babu Surendra Nath Guha for the Appellants.

Babus Biraj Mohan Mojumdar and *Upendra Kumar Roy* for the Respondents.

The judgment of the Court was as follows :

We have before us an appeal against an order of an appellate Court modifying a decision of the lower Court dated the 21st November 1910, by which execution proceedings in that Court were dismissed. The substantial question before us is whether the proceedings in execution were barred by limitation. Before the period of limitation had arrived, the decree-holder applied to the Court to be allowed to file a list of immovable properties which he had not filed till then. The application was one under Order 21, Rule 17 of the Civil Procedure Code, on which the Court could make an order under Rule 17. It was open to the Court to reject the application, or to allow the list to be filed then and there or within a time to be fixed by the Court. The Court as a matter of fact did none of these things. It simply made the order "permitted" which we must take as being an order to the effect that the list might be filed at any time. Subsequently, however, the list was filed ; but by that time the period of limitation had already run. The only way in which the effect of limitation can be excluded in this case is under paragraph (2) of Rule 17 of the Civil Procedure Code ; but in this case the application has not been amended according to the provisions of sub-Rule (1), because no time was fixed by the Court within which the list was to be filed. On looking into the facts of the case, it appears that this error was due to the fact that the application was made within a very short time of the expiration of the period of limitation, and it was not brought to the notice of the Court that there was any question of limitation ; and had the list been filed before the period of

CIVIL

1918.

Salimullah

v.

Sainaddi Sarkar.

June, 11.

CIVIL.

1918.

Salimullah

v.

Sainaddi Sarkar.

limitation the present objections would not have arisen. We must however hold that the law was not complied with and as the necessary formalities were not carried out within the time prescribed by law, we must uphold the judgment of the appellate Court and dismiss this appeal with costs. The hearing fee, two gold mohurs.

A. N. R. C.

Appeal dismissed.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice
and Sir Asutosh Mookerjee, Knight, Judge.*

GOSSAIN DAS KUNDU AND OTHERS

v.

MRITUNJOY AGNAN SARDAR AND ANOTHER.*

Sale certificate—Construction—Boundary—Area.

CIVIL.

1918.

May, 29.

In the sale certificate the boundaries of parcels sold were set out in detail. In the case of each parcel the area also was stated :

Held that the purchaser took the plots as defined by the boundaries, and if within those boundaries there was more or less of land than that stated in the sale certificate, he obtained a title to whatever was contained within those boundaries.

Appeal by the Plaintiffs.

Suit for ejectment.

The defendants mortgaged certain land to the plaintiffs. The plaintiffs sued on their mortgage, obtained a decree, sold the land in execution and purchased it themselves. They subsequently obtained possession. They alleged that they were subsequently dispossessed by the defendants and hence they brought this suit.

The defendants owned other lands in the vicinity ; and the only question that arose was whether the disputed land lay within that purchased by the plaintiffs in execution of their mortgage decree.

The suit was dismissed in appeal by the District Judge and the appeal of the plaintiffs was dismissed on the 21st April, 1911, by Mr. Justice Coxe.

Babu Jey Gopal Ghosha for the Appellants.

Babu Surendra Nath Ghoshal for the Respondents.

The following judgment was delivered by

Coxe J.—The defendants in this case mortgaged certain land to the plaintiffs. The plaintiffs sued on their mortgage, obtained a decree, sold the land in execution and purchased it themselves. They subsequently obtained possession. They allege that they were subsequently dispossessed by the defendants and hence they brought this suit.

The defendants own other lands in the vicinity : and the only question that arises in the suit is whether the land in suit lies within the land purchased by the plaintiffs in execution of their mortgage decree.

* Letters Patent Appeal No. 104 of 1911, against the decision of Mr. Justice Coxe, dated the 21st April, 1911, in Appeal from Appellate Decree No. 44 of 1910, against the decree of E. B. Forrester, Esq., District Judge of Midnapur, dated the 15th September, 1909, reversing that of Babu Lut Behari Chatterjee, Munsiff, 4th Court, of Midnapur, dated the 31st August, 1908,

1911

April,

CIVIL

1918.

Goswain Das

v.

Mr. Kunjoy.

O'Connell, J.

The suit has been dismissed in appeal by the learned District Judge and the plaintiffs appeal.

It is argued on their behalf that the District Judge was bound to come to a finding whether the land in dispute lay within the boundaries of the plaintiffs' sale-certificate and was not entitled to dismiss the suit on the ground that the area in the plaintiffs' possession was in excess of that mentioned in the sale-certificate.

There is no doubt that if the learned District Judge had dismissed the suit merely on the ground that the area in the plaintiffs' possession was greater than that stated in the sale-certificate, his decision could not be supported. But though I must concede that his language admits of some doubt as to his meaning, I do not think that this was what he intended to find. He says at the end of his judgment that "the plaintiffs are entitled to lands within the four corners of their sale-certificate as far as may be. That they have got in my opinion and they are entitled to nothing more." This certainly is a finding that the plaintiffs are in possession of the land included within the four corners of their sale-certificate. Further back he remarks: "All that the map and report prove is that the plaintiffs have got possession of 66 bighas as representing 64 bighas of plot 1 of their sale-certificate and that there has been a confusion of boundaries between the Chackran and rent-paying lands of the defendants." This, in the learned District Judge's opinion, was all that the map and report of the Commissioner proved. They did not therefore prove in his opinion that the land described by the boundaries in the sale-certificate was identical with the disputed land. The words "all that the map and report prove" must mean that, in the learned District Judge's opinion they proved nothing else, and did not establish that the land included in the sale-certificate could be identified by the boundaries in the sale-certificate.

Reading the judgment as a whole, the District Judge's opinion appears to have been that on the evidence before him, he could not sufficiently identify the land covered by the sale-certificate and that is a decision with which I cannot interfere.

Plot No. 1 of the sale-certificate was bounded on the east and the north by the Chakran lands of the defendants so that it is easy to understand that the learned District Judge may not have been able from the Commissioner's map and report to locate the exact position of the land covered by the sale-certificate,

I think, therefore, that the appeal fails and must be dismissed with costs.

Against this decision, the plaintiffs preferred an appeal under section 15 of the Letters Patent.

Babu Mohini Mohon Chatterjee for the Appellants.

Babu Surendra Nath Ghoshal for the Respondents.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal under section 15 of the Letters Patent from a judgment of Mr. Justice Coxe. The plaintiff, now appellant before this Court, purchased certain properties at a sale held in execution of a mortgage on the 24th of November, 1900. His case is that the lands in dispute are comprised within the boundaries of the parcels which he purchased on that occasion. The Court of first instance appointed a Commissioner who made a survey and prepared a map, and the Court found that parts of the lands in suit were included in the boundaries as given in the sale-certificate. In this view it gave the plaintiff a decree. On appeal that judgment was set aside by the District Judge, and the decree of the District Judge has been confirmed on appeal by Mr. Justice Coxe.

On behalf of the appellant it has been argued that in the present instance the boundaries must prevail over the areas mentioned in the sale-certificate. There can be no doubt as to the correctness of this contention. The boundaries of the seven parcels mentioned in the sale-certificate are set out in detail. In the case of each parcel the area also is stated. It is clear that the purchaser took the plots as defined by the boundaries, and if within those boundaries there is more or less of land than that stated in the sale-certificate, he has obtained a title to whatever is contained within those boundaries. But this view has not been accepted by the District Judge.

This appeal must therefore be allowed, the decree of Mr. Justice Coxe set aside, and the case sent back to the District Judge in order that the appeal may be reheard. The District Judge must determine the boundaries of the plots as given in the sale-certificate and then ascertain whether the lands claimed by the plaintiff are comprised in these boundaries. If they are comprised as alleged, the plaintiff is entitled to them.

We may add that this is evidently a case which the parties may do well to settle, and when the case goes back to the District Judge, they may, we trust, see their way to settle it.

Costs will abide the result.

A. T. M.

Appeal allowed: case remanded.

CIVIL.

1918.

Gosain Das

v.

Mrittunjoy.

Coxe, J.

May, 29.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.*

DINA NATH DAS AND OTHERS

v.

GANESH CHANDRA SAHA AND OTHERS.*

*Burden of proof—Plaintiff's title admitted—Defendant claiming subordinate
interest derogatory to that title.*

The plaintiff claimed a piece of land as belonging to him. The defendant did not deny the plaintiff's title, but said that he had a subordinate interest (*vis. raiyat* interest) under the plaintiff :

Held, that when the title of the plaintiff was not contested, it was on the defendant to prove his subordinate interest which was said to derogate from that title.

Appeal by the Plaintiff.

Suit for ejectment.

The plaintiffs sought to recover certain piece of land as their *khas patit* land. The defendants set up a *jote* right in respect of that plot and asserted that they held their tenancy under the plaintiffs for which they paid rent. The Munsiff decreed the suit, but the Subordinate Judge reversed that decision on appeal. The plaintiffs then preferred a second appeal, which was heard by Mr. Justice Caspersz on the 30th November, 1910, who affirmed the decision of the Subordinate Judge by the following judgment :

Caspersz J.—The land involved in this litigation is a *doba* or ditch covered by *dag* 707. The plaintiffs sought to recover possession of the *doba* on the allegation that it was their *khas patit* land. The defendants, on the other hand, set up a *jote* right in respect of that plot, and asserted that they held their tenancy under the plaintiffs for which they paid rent, at first, Rs. 4-2 which was subsequently increased to Rs. 4-8, the 6 annas representing the rent of the plot added to the original area of the holding. There was a previous rent suit between the parties in which the plaintiffs sought to recover rent at the original *jama* of Rs. 4-2, and that suit was decreed at that rate ; but there is a concluding observation in the judgment of the appellate Court that the question of land appertaining to the holding will be left open.

The principal piece of evidence on the side of the defendants

* Letters Patent Appeal No. 1 of 1911 from the decision of Mr. Justice Caspersz, dated the 30th November, 1910, in Appeal from Appellate Decree No. 404 of 1909, against the decree of Babu Lehit Kumar Bose, Subordinate Judge, 3rd Court, of Tipperah, dated the 4th December, 1908, reversing that of Babu Hem Chandra Bose, Munsiff, 2nd Court at Brahmanbaria, dated the 5th July, 1907.

CIVIL.

1918.

June, 4.

1910.

November, 30.

then, as now, is Exhibit B, a *dakhila* (rent receipt) purporting to have been granted by the plaintiff's son in which plot 707 was specified among other plots. The first Court thought the *dakhila* to be not genuine and refrained from deciding the further question, namely, whether the *dakhila* is binding on the plaintiffs. The Munsiff decreed the plaintiffs' suit, but the Subordinate Judge has reversed that decision.

CIVIL.
1918.
Dina Nath
v.
Ganesh Chandra.
OASPER, J.

In second appeal, the contentions are three in number, *first*, that the Subordinate Judge has wrongly thrown the *onus* on the plaintiffs, and that he is in error in saying that there was no evidence on the plaintiffs' side on the question of parcel or no parcel; *secondly*, that the previous decision *inter partes* is, virtually, *res judicata* on the question whether the plot 707 formed part of the defendants' tenancy: and *thirdly*, that the Subordinate Judge has not decided whether the receipt, if genuine, was binding on the plaintiffs.

With regard to the first contention it is argued that the facts of this case differentiate it from *Rajendra Kumar Bose v. Mohim Chandra Ghose* (1) and my attention has been called to the decision in *Nanda Lal Goswami v. Jajneswar Halder* (2), which distinguishes the decision first cited. Reference has, also, been made to the case of *Narsing Narain Singh v. Dharam Thakur* (3). These cases were considered by this Court in a decision to which I was a party *Baraik Kamal Sahi v. Lilhu Christian* (4), and, in the circumstances of that case, it was held that the *onus* lay on the defendants to prove their occupancy right. I think that when the relation of landlord and tenant is admitted and has been proved between the parties to the present litigation, any further questions as to the *jama* and area held by the defendants under the landlords do not refer to the status of tenancy but rather to the contract between landlord and tenant. The relation of landlord and tenant exists, whatever may be the precise area of land in respect of which it is continued, whether it be more land at one period of time or at another, less land. That does not affect the relationship existing which involves the obligation to pay rent. The further question, therefore, as to whether plot 707 is part of the defendants' tenancy ought to be decided on the general principles laid down in *Rajendra Kumar Bose v. Mohim Chandra Ghose* (1). The ordinary rule is that the plaintiffs must establish his own case and make it strong in

(1) (1894) 3 O. W. N. 763.

(3) (1904) 9 O. W. N. 144.

(2) (1901) 6 O. W. N. 105.

(4) (1918) 8 O. L. J. 170.

CIVIL.

1918.

Dina Nath

v.

Ganesh Chandra.

Carpenter, J.

order to disturb possession of a long duration. It has been found in the present case that the defendants are in possession of this plot. They are willing to pay rent for the same, and it lies on the plaintiffs to show that the land is not raiyati but *thas patit*. I am not quite sure what the Subordinate Judge meant by saying that there is no evidence on the plaintiffs' side; but I apprehend his remark was on the question of parcel or no parcel. The evidence was in favour of the defendants' case, and the principal item of evidence, which I have already mentioned, was the rent receipt (Exhibit B), and that of course, was produced by the defendants. I, accordingly, overrule the first contention raised on behalf of the plaintiffs appellants.

On the second contention, if *res judicata*, I observe that it is put somewhat differently in the grounds of appeal, but, taking it to be that the present suit is concluded by the finding in the plaintiffs' rent suit, I do not think that any effect can be given to such a contention. I have already said that the question as to the land of plot 707 being part of defendants' *jote* was left open in the judgment of the appellate Court. That is the precise point which has now come up for final adjudication. As observed in the case of *Dwarka Nath Roy v. Ram Chand Aich* (1), by Sir Francis Maclean, Chief Justice "The issue determined in the previous suit (rent suit) was whether the relationship of landlord and tenant existed at the time when that suit was instituted between the present plaintiff and the then defendant, and whether the then defendant was liable for the amount then claimed as rent. That issue was decided against the present plaintiff and that question must be treated as *res judicata* as against the plaintiff and in the defendant's favour. But the relief sought in the present suit is absolutely different from the relief sought in the previous suit. The present issue is whether the land in dispute belongs to the plaintiff." I have already explained that the question, as to the inclusion or otherwise of plot 707 within the holding is not one affecting the relation of landlord and tenant. The decision of the Full Bench I have quoted is opposed to the contention of *res judicata* now raised, and I follow it in the present case. The second contention is accordingly negatived.

With regard to the third and last contention, that the Subordinate Judge did not go into the question whether Exhibit B is binding, having been given by the son of plaintiff No. 1, I have carefully considered whether it is necessary to send back

(1) (1899) 1 L. B. 26 Calo. 428.

this case for the lower appellate Court to record a finding on that point. But on consideration I think it is not necessary. It has been common ground between the parties to this litigation that the plaintiff's son collected rent and granted receipts. It has been found by the Subordinate Judge, on examination of the receipts, and on the evidence of a certain doctor, that Exhibit B is perfectly genuine, and, inasmuch as plot 707 is included within that *dakhila*, I think the plaintiffs must be deemed to have failed to make out any exclusive title to that plot, as forming part of their *khas patit* land.

In these circumstances this appeal fails and is dismissed with costs.

Against this decision, the plaintiffs preferred an appeal under section 15 of the Letters Patent.

Babu Harendra Narayan Miller for the Appellants.

Babus Tarakishore Chowdhury and *Gopal Chunder Das* for the Respondents.

The judgment of the Court was delivered by

Jenkins C. J.—This is an appeal under the Letters Patent from a judgment of Mr. Justice Caspersz who has confirmed the decree of the lower appellate Court. The argument before us is that Mr. Justice Caspersz's judgment is erroneous, because he has failed to observe that the Subordinate Judge wrongly cast the *onus* of proof on the plaintiff. The facts of the case are these: The plaintiff claims the piece of land in suit as belonging to him. The defendant does not deny the plaintiff's title, but says that he has a subordinate interest under the plaintiff, and an interest in derogation of the plaintiff's right to possession. On that statement it is clear how the *onus* would lie:—It is on the plaintiff to establish his title; and that title is not contested. Therefore it is on the defendant to prove his subordinate interest which is said to derogate from that title. If we had thought that the learned Subordinate Judge had not so treated the case, we should certainly have been compelled to interfere with the judgment now under appeal. But we agree with the judgment of the Subordinate Judge which affirmed, on the facts and in particular the long possession, that this piece of land was a part of the defendant's *jote* under the plaintiff. The learned Subordinate Judge treated the question properly as one of parcel or no parcel, and on this evidence he said this disputed piece of land fell within the ambit of the *jote*. No doubt he says that the plaintiff has not any evidence on his

CIVIL.

1918.

Dina Nath

v.

Ganesh Chandra.

Caspersz, J.

June 4.

CIVIL.

1918

Dina Nath
v.
Ganesh Chandra.
Jenkins, C. J.

side, but as I understand that remark its significance is that there is nothing to controvert the evidence on which the defendant relies: so that in this reading of the case the learned Subordinate Judge did recognize that the *onus* was on the defendant to show that the disputed piece of land fell within his *jote*, and on the evidence he was satisfied that such proof had been adduced by the defendant and that it had not been rebutted by the plaintiff. In that aspect of the case there was no error of law in the judgment of the lower appellate Court or in the judgment of Mr. Justice Caspersz. We must accordingly dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.*

GANPAT MARWARI

v.

BALMAKUND BEHARA AND ANOTHER.*

CIVIL.

1913.

June, 9.

Burden of proof—Joint family—Separation.

Where a family is joint and a *nucleus* exists, the *onus* is on the party setting up a case of separate property.

Appeal by the Defendant.

Suit by two plaintiffs for recovery of Rs. 1,000 deposited by their deceased brother with the defendant banker. It was found as a fact by the lower appellate Court that the three brothers were joint when the money was deposited and that the deposit was derived from joint funds.

The Court of first instance found that the money was not joint family property, that as the deceased brother's widow was alive, the plaintiff had no right to sue and that the money had, in fact, been repaid. The result was the dismissal of the suit. The lower appellate Court reversed all those findings and decreed the suit.

The appeal came on for hearing on the 15th December, 1911, before Mr. Justice Carnduff, who on the 20th December, delivered the following judgment.

Carnduff J.—This was a suit brought by the two plaintiffs for the recovery of Rs. 1,000 admittedly deposited by their deceased brother, Radhasham Behara, with a

1911.
December, 20.

* Letters Patent Appeal No. 6 of 1912, against the decision of Mr. Justice Carnduff, dated the 20th December, 1911, in Appeal from Appellate Decree No. 1803 of 1909, against the decree of L. C. Adami, Esq., District Judge of Cuttack, dated the 25th May, 1909, reversing that of Babu Purna Chandra Mitra, Subordinate Judge of Sambalpur, dated the 18th February, 1907.

banker. In the Court of first instance it was found that the money was not joint family property, that, therefore, Radhasham's widow being alive, the plaintiffs had no right to sue; and that the money had, in fact, been repaid. As a result the suit was at first dismissed. The learned District Judge has, however, reversed all the above findings and decreed it; and the defendant banker has now preferred this second appeal.

CIVIL.

1918.

Ganpat Marwari

v.

Balmakund Behara.

Garduff, J.

The District Judge's decision is attacked mainly with reference to the law he has enunciated as to the presumption in favour of a Hindu family being joint and property in the hands of a member of it being family property. He has, it is said, gone too far in throwing the *onus* entirely on the appellant and holding that it is to be presumed, not only that Radhasham was joint with his brothers, the respondents, when the money was deposited by him, but also that the deposit was derived from joint funds. The contention is that, in circumstances such as those of the present case, the ordinary presumption of Hindu law does not arise; and in support of it I am referred to *Ram Pershad Singh v. Lakhpati Koor* (1) and *Gannu Singh v. Bhagwati Koori* (2). In these cases this Court undoubtedly expressed the opinion that, when there is separate residence, separate messing and separate worship among the members of a Hindu family, the presumption based on the theory of the normal condition of such a family "can hardly be said to hold good" or, in the words used in the later case, "falls to the ground"; the contrary presumption then arises: and it rests on the party who alleges continuance of indivision in spite of severance in these particulars to establish his allegation. Now, in each of these instances this Court was dealing with the facts in a regular appeal, and what was held was simply this, that the facts found as to cesser of commensality and so forth, being themselves inconsistent with the normal state of a Hindu family, were sufficient, *prima facie*, to show separation and shift the burden of proof on to the side asserting that the family had nevertheless remained joint. Jointness is, I imagine, becoming almost daily less and less the rule, and the presumption under consideration is, amid the changing conditions, and in response to the natural demands, of a progressive society, steadily losing strength, in the sense that it is more and more easily rebutted as time advances. It may well be that it will

(1) (1909) I.L.B. 80 Cal. 231 (244); 7 O. W. N. 162; T. B. 80 I. A. 1.

(2) (1909) 3 I. O. 284 (B. A. 296 of 1906).

CIVIL.

1918.

Ganpat Marwari
 v.
 Balmakund Behara,
 Oran^oduff, J.

disappear altogether some day perhaps at no distant date; but I can find no authority either in the rulings cited or elsewhere such as to justify me in holding to-day, that there are cases in which it does not exist at all and is not, so to speak, the starting point. On behalf of the appellant it has, indeed, been conceded that no fault can be found with the learned District Judge's initial observation that the *onus* of proving that the three brothers were not joint lay upon him. But it is argued that the Judge misdirected himself when he proceeded to lay it down that it was also to be presumed that the money deposited was derived from the joint funds, and that he was wrong in dismissing the suit because the defendant had failed to prove affirmatively that it was self-acquired property. In this connection reference is made to the case of *Dwarka Prosad v. Raghuber* (1) in which Beaman J. has held that "it is not a presumption of the Hindu Law that every member of a joint Hindu family, found to be in possession of property at his death, has necessarily acquired that property as a member of the joint family and so imprinted upon it, the character of joint Hindu family property." But the learned vakil for the appellant has overlooked the fact that Mr. Justice Beaman at once goes on to observe that, "before that presumption can be made it lies upon the party so alleging to prove that there was at least a *nucleus* of joint family property out of which the property ultimately acquired by an individual member may be said to have grown." Here it is obvious, and cannot be denied, that there was such a *nucleus*; and, therefore, the Bombay case really does not help the appellant. My conclusion, then, is that the learned District Judge made no mistake in this connection and that his findings of fact conclude this part of the appeal.

It is next contended that, even if the family were joint and Radhasham acting as manager, his discharge in respect of the sums paid before his death was good and sufficient to bind the family: and the appellant relies for support upon the recent decision of the Judicial Committee in *Kishen Parshad v. Har Narain Singh* (1) by which it has been settled that the manager on behalf of a joint Hindu family of the family banking business can not only enter into contracts and give discharges so as to bind his co-parceners, but also sue and be sued alone without the joinder of the other members of the family. This contention seems to me to be right: otherwise no bank could

(1) (1910) 18 Bom. L. R. 188. (2) (1911) L. R. 88 I. A. 45; 9 O. L. J. 158; 18 O. W. N. 321.

with safety honour cheques drawn by its Hindu clients against their deposits, and business on modern lines would be impossible. But unfortunately for the appellant the lower appellate Court has found that his plea of repayment has not been proved, and he is again concluded by a finding of fact which, so far as I can see, cannot be questioned on second appeal.

The last point made is as to the construction placed on a certain *ekrarnama* (Ex. 1), upon which the learned District Judge has relied as proving, "almost, if not quite, conclusively" that the brothers were joint a fortnight before the death of Radhasham. In this document, which was signed by all three brothers, it was agreed that, "there having been serious disputes about the partition of the whole of their movable and immovable joint properties and there having been no settlement about the said partition," a *punch* was to be appointed to settle the dispute by arbitration. This, it is argued, instead of indicating jointness on the date of the document, points to there having already been some sort of a partition regarding which disputes calling for settlement by arbitration had arisen. It may be that there is something to be said for this construction; but it has long since been established. See the well-known and frequently cited ruling of Couch, C. J. and Glover, J. in *Nowbut Singh v. Chutter Dharee Singh* (1) that the misconstruction of a piece of documentary evidence such as this is not a mistake of law upon which a second appeal will lie. Moreover, the suggestion that the *ekrarnama* ought to be construed in this way is made for the first time in the course of the argument before me, the theory of the defence having hitherto been that it was an agreement to separate which at once operated as a separation. For all these reasons I find myself unable to yield the point.

In the result, I am of opinion that this second appeal must be dismissed with costs.

Against this decision, the defendant preferred an appeal under section 15 of the Letters Patent.

Babu Jogendra Chandra Ghose for the Appellant.

Babus Sarat Chandra Roy Chowdhry and *Biraj Mohan Mojumdar* for the Respondents.

The judgment of the Court was delivered by

Jenkins C. J.—This is an appeal under the Letters Patent from a judgment of Mr. Justice Carnduff confirming the decree of the lower appellate Court.

CIVIL.

1918.

Ganpat Marwari
v.
Balmakund Behara.

Carnduff, J.

June 9.

CIVIL.

1918.

Ganpat Marwari
v.
Balmakund Behara.

Jenkins, O. J.

The suit is one brought by two Hindu brothers against a banker, and their case is that their deceased brother Radhasham had deposited with the banker Rs. 1,000, and that by reason of this brother's death, the whole of this Rs. 1,000 vested in them as survivors.

The defence of the suit was that the Rs. 1,000 was deposited with the defendant by Radhasham, and that at that time Radhasham was separate from his brothers, so that this was his separate self-acquired property.

This defence succeeded in the Court of first instance. The decree of the first Court was, however, reversed by the lower appellate Court, and the question before Mr. Justice Carnduff, as now before us, was whether that decree should have been reversed.

It was found by the lower appellate Court that Radhasham, and the two plaintiffs were joint. That was based not only on the presumption of the jointness of a Hindu family, for the Judge goes on to discuss evidence which convinced him of the joint state of the family. That inference was justifiable and it is not open to us in second appeal to interfere with it.

It has been laid down consistently and it may be said to have been laid down authoritatively by the Privy Council in *Anandrao Ganpatrao v. Vasantrao Madhavrao* (1) that where a family is joint and a *nucleus* exists, the *onus* is on the party setting up a case of separate estate. We have here one of those two factors established beyond dispute, the family was joint. There is the further question, was there a *nucleus*? Mr. Justice Carnduff's finding on that point is distinct, and the indications in the evidence appear to support that conclusion. It is true that the matter has not been discussed by the lower appellate Court with detail and clearness. But there is an explanation of this. As I read this litigation, the real question at issue between the parties, was whether Radhasham was separate from his brother and whether the Rs. 1,000 was his self-acquired property when it was deposited with the banker. The conclusion to which I come is that not only has the family been conclusively held to be joint, but also that there was a *nucleus* and that the defendant failed to discharge the *onus* cast upon him. Reliance has been placed upon the agreement of the 13th of July 1906 as showing that at any rate there was a partition at that time. Assuming that to be so,

(1) (1907) 5 O. L. J. 888 (339); 11 C. W. N. 478 (486)

it would not carry the whole of the Rs. 1,000 to the widow of Radhasham. The utmost that could be said would be that she should have been joined as a party: But for reasons probably closely allied to those I have indicated as an explanation of another defect in this case, no objection was taken to her not being joined. In the circumstances we do not think that we ought to give effect to this objection which has not been taken in any course of the proceeding and has emerged merely as the result of discussion in the course of the argument in this Court.

For these reasons, therefore, we must dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

*Before Sir Lawrence Jenkins, K. C. J. E., Chief Justice,
and Sir Asutosh Mukerjee, Knight, Judge.*

BHAIRAB CHANDRA NASKAR AND OTHERS

v.

KADAM BEWA.*

Limitation—Forfeiture—Denial of landlord's title—Limitation Act (XV of 1877), Sch. II, Arts. 143, 144.

A suit for possession on the ground of forfeiture for repudiation of the title of the plaintiff is governed by Article 144 and not by Article 143, Sch. II, of the Indian Limitation Act.

Appeal by the Plaintiffs.

Suit for ejectment.

In 1894 the predecessor in title of the appellants sued the respondents for arrears of rent of the homestead land. On that occasion the respondents in their written statement denied the relationship of landlord and tenant, and the suit was eventually dismissed on the 4th December, 1895, on the ground that the relationship of landlord and tenant had not been established. The present suit was brought more than 12 years after the filing of the written statement, but within 12 years of the passing of the decree of dismissal above referred to. The lower appellate Court held it was barred by Art. 143, Sch. II of the Indian Limitation Act and this decision was affirmed in second appeal by Mr. Justice Carnduff on 4th December, 1911.

* Letters Patent Appeal No 2 of 1912, against the decision of Mr. Justice Carnduff, dated the 4th December, 1911, in Appeal from Appellate Decree No. 321 of 1909, against the decree of Babu Mohim Chandra Sarkar, Subordinate Judge, 2nd Court of 24-Parganas, dated the 25th November, 1908, reversing that of Babu Asutosh Mukerjee, Munsiff, 8rd Court, of Diamond Harbour, dated the 18th July, 1908.

CIVIL.

1918.

Ganpat Marwari
v.
Balmakund Behara.

Jenkins, C. J.

CIVIL.

1918.

June, 10.

CIVIL.

1918.

Bhairab Chandra

v.

Kadam Bewa.

1911.

December, 4.

Babus Harendra Narayan Mitra (for *Babu Mahendra Nath Roy*), *Krishna Prosad Sarbadhikari* and *Monmotho Nath Roy* for the Appellants.

Babu Provas Chandra Mitter for the Respondent.

The following judgment was delivered by

Carnduff J.—This appeal arises out of an action in ejectment in which the present appellants sued to recover possession of a plot of homestead land from the respondent. The suit was decreed by the Court of first instance, but has been dismissed by the lower appellate Court ; and the only point of law which arises, is that of limitation on which the latter Court has based its judgment of reversal. The point may be then briefly put. In 1894 the predecessor in title of the appellants sued the respondents for arrears of the rent of the land in suit. On that occasion the respondents in their written statement denied the relationship of landlord and tenant, and the suit was eventually dismissed on the 4th December, 1895, on appeal on the ground that the relationship of landlord and tenant had not been established. The present suit for recovery of possession was brought admittedly more than 12 years after the filing of that written statement, but within 12 years of the passing of the decree of dismissal above referred to, and the lower appellate Court has held that it is barred by Art. 143 of the second schedule to the Indian Limitation Act, 1877, which applies in this case. The Article cited provides that in a suit for possession of immovable property, when the plaintiff has become entitled by reason of any forfeiture or breach of condition, the period of limitation shall be 12 years from the time when the forfeiture is incurred or the condition is broken. The learned vakil for the appellants contends before me that the word "forfeiture" here means legal forfeiture, which is something more than mere repudiation by a tenant of his landlord's title. He argues that "forfeiture" is defined by section III, clause (g), of the Transfer of Property Act, 1882, which enacts that "a lease of immovable property determines by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may reenter or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease." His point is that the "forfeiture" referred to in the Limitation Act of 1877

must be understood in the light of the so-called definition of the word in the Transfer of property Act of 1882, and that, therefore, limitation does not begin to run until the lessor or his transferee has done some act showing his intention to determine the lease.

Assuming that the land with which we are concerned in this suit, is land to which the Transfer of Property Act would apply, I am of opinion that there is no warrant whatever for importing this provision—for section 111 (g) is much more than a mere “definition”—into the earlier Limitation Act. In my view, the ordinary meaning of the words used must be looked to, and a forfeiture is incurred when the condition is broken or the repudiation takes place, the lessor becoming entitled at that moment to determine the tenancy and recover possession if he chooses. The learned vakil has referred in the course of his argument to the cases of *Srinivasa Ayyar v. Muthusami Pillai* (1), — *Seshamma Shettati v. Chickaya Hegade* (2) and *Anandamoyee v. Lakhi Chandra Mitra* (3) but while the two Madras cases are clearly distinguishable, the language of the judgment in the Calcutta case seems rather to support the view I take of what is meant by “forfeiture.” On the other hand I think that the decision of this Court in the case of *Goochi Sheikh v. Mathewson* (4) although not exactly on point, is at least in entire accord with my construction of the Article under consideration. I am of opinion, therefore, that the suit has rightly been held by the lower appellate Court to have been barred.

It has further been argued that Art. 139, and not Art. 143, is the Article applicable, and that, as this tenancy was apparently not determined by anything done to indicate the necessary intention on the part of the appellants before the present action was brought, the action was brought in good time. But the contention comes too late. The appellants' plaint was based entirely upon forfeiture by repudiation, and not upon the actual determination of the tenancy; the whole suit was framed accordingly, and it proceeded on that basis; the idea now put forward was apparently never thought of in the first Court of appeal; and there are no materials before me to enable me to decide, when, if ever, something was done to show that the lessors wished to determine the lease. The suggestion before the learned Subordinate Judge seems to have been that the judgment of the 4th December, 1895, gave the cause of action, and that the

CIVIL.

1913.

Bhalrab Chandra
r.

Kadam Bewa.

Oaraduff, J.

(1) (1900) I. L. R. 24 Mad. 246.

(3) (1906) I. L. R. 33 Cal. 339.

(2) (1902) I. L. R. 26 Mad. 507.

(4) (1907) II O. W. N. 661.

CIVIL

1918.

Bhairab Chandra

v.
Kadam Bewa.

Oarnduff, J.

period of limitation ought to be calculated from that date; and that suggestion was, I think, rightly rejected. It seems to me to be altogether untenable.

The result is that this appeal must stand dismissed with costs.

Against this decision, the plaintiffs preferred an appeal under section 15 of the Letters Patent.

Babu Monmotha Nath Roy (with him *Babus Mohendro Nath Roy* and *Krishna Provasd Sarbadhikari*) for the Appellants.

Babu Susil Madhub Mullick (with him *Babu Provas Chandra Mitra*) for the Respondent.

The judgment of the Court was delivered by

June, 20.

Jenkins C. J.—We agree with the plaintiff that the case is not governed by Article 143 in the second schedule to the Limitation Act, but we come to this conclusion for a reason that is conclusive against him under Article 144. Article 143 does not apply because the relationship of landlord and tenant does not exist and has not existed between the plaintiff and the defendants. It was so decided in the suit of 1894. The defendants have been in possession for more than twelve years prior to the institution of the suit, and the circumstances of their possession make it manifest that it was adverse: and, therefore, the plaintiff's suit is barred not by Article 143 but by Article 144.

For this reason we must dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

Before, Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

RAMTARAN NAG MAZUMDAR AND OTHERS

v.

HARI CHARAN NAG MAZUMDAR AND OTHERS.*

CIVIL

1918.

June, 11.

Partition, suit for—Plots belonging to some co-sharers.

Plots belonging to some and not to all the co-sharers, cannot be brought into hotchpot in a suit for partition.

Appeal by the Plaintiffs.

Suit for partition.

* Letters Patent Appeal No. 19 of 1912, against the decision of Mr. Justice Coxe, dated the 20th January, 1912 in Appeal from Appellate Decree No. 254 of 1909, against the decree of S. B. Chowdhury, Esq., District Judge of Khulna, dated the 18th August, 1908, affirming that of Babu Hem Chandra Das Gupta, Munsiff, 1st Court at Fagerhat, dated the 29th August, 1907.

The suit was dismissed by the first Court but decreed in appeal by the lower appellate Court.

The appeal came to be heard on the 17th January, 1912 by Mr. Justice Coxe.

Babu Narendra Kumar Bose for the Appellants.

Babu Jadu Nath Kanjilal for the Respondents. C. A. V.

The following judgment was delivered by

Coxe J.—This was a suit for partition which was dismissed by the Munsiff but decreed in appeal by the District Judge of Khulna.

There are two points in the judgment of the learned District Judge which are attacked in appeal by the defendants Nos. 1 to 6 and 8. The first is that the District Judge has found that a 2 annas share only had been separated off from the parent property in a previous partition and it is urged that really a share of 4 annas was so partitioned off.

It does not appear to me that this matter can be dealt with by me in second appeal. The record of the former partition is lost; and all that remains is a map. The Munsiff, after considering the evidence, came to the conclusion that the 2 annas share of Sri Nath who was the decree-holder on the former occasion and also the 2 annas share of Kashiswar and Biseswar—in all 4 annas—were partitioned off. The District Judge, on the evidence before him, thought that this was incorrect and that the share separated off was 2 annas. It is said that he misconstrued the map. The map, however, is a mere piece of evidence; and if the learned District Judge misconstrued, or misunderstood it, I do not think that the error is one that can be corrected in second appeal. Moreover, the appellants Kashiswar and Biseswar have not been seriously prejudiced by the order inasmuch as the District Judge has ordered that the 2 annas share will be allotted to them, of which they are now in possession.

The second point taken is that the learned District Judge should have ordered the two *bhitas* which are close to the homestead to be brought under partition. The Munsiff found that these *bhitas* belonged jointly to the plaintiff and the defendants Nos. 1 to 6. The learned District Judge directed that they should not be brought under partition relying on the case of *Syed Habibur Rasul Abul Fais v. Ashita Mohan Ghosh* (1).

CIVIL.

1912.

Ramtaran

Hari Oharan

1912.

January, 30.

CIVIL.

1918.

Ramtaranv.
Hari CharanOsw., J.

It appears, on a perusal of that judgment, that it proceeded almost entirely on considerations of convenience. Those considerations in the present case, so far as the two *bhitas* are concerned, seem rather in favour of the partition. It may lead to an unnecessary multiplicity of suits if this homestead be first partitioned and then another suit is rendered necessary in respect of the two *bhitas* which are close to the homestead. I am not much impressed by the fact that Kashiswar and Biseswar are said not to be interested in this portion of the joint property. Certainly, on considerations of convenience, the mere fact, that one or two partners are not interested in a small portion of the whole property to be partitioned, is no reason why the partition should not be carried out. In most cases of that nature the balance of convenience might be greatly in favour of the partition being effected.

It is not possible however to deal with this point by itself. The Munsiff, in the view that he took of the case, did not find it necessary to consider or discuss the question whether other property alleged to be joint, especially Manik Ghose's *bhita*, should be brought under partition. But the learned District Judge, when he decided that partition should proceed, should have dealt with this point. It is evident that it may affect all the considerations of convenience by which the partition of the two *bhitas* close to the homestead may be justified. Accordingly, the case, must be remanded to the District Judge in order that he may decide precisely, in the light of the foregoing observations, what property shall be covered by the partition that he has directed. The partition will then proceed. I do not think it necessary to pass any order for costs in this case.

No. 2530 of 1908.—Now that the property is to be partitioned the learned pleader for the appellant concedes that it is unnecessary to proceed with this appeal. It is dismissed without costs.

Against these decisions, the plaintiffs preferred an appeal under section 15 of the Letters Patent.

Babu Yadu Nath Kanjilal for the Appellants.

Babu Narendra Kumar Bose for the Respondents.

The judgment of the Court was delivered by

June, 11.

Jenkins C. J.—This appeal arises out of a suit for partition. Before the Munsiff the suit failed, for it was there held not only that the land now in suit had been partitioned but that there was also other *ijmalit* land. The District Judge negatived the

finding of a previous partition; and, with regard to the other *ijmali* land he said "the two *bhitas* do not belong to all the co-sharers of this land, but only to some of them. That being so, they could not be brought into hotchpot." That appears to us to be a correct exposition of the law. A point has been made in the High Court that the District Judge was in error in so far as he did not give effect to the plea that Manick Ghose's *bhita* was not included in the partition. The learned District Judge makes no allusion to this, and at the first blush it might appear as though there was an error in this respect. But we have been referred to a map in this case which affords a complete explanation and it is that the Manick Ghose's *bhita* was a tank and so was regarded as indivisible. Doubtless, those who argued the case before the District Judge did not, out of respect to him, advance any argument with regard to Manick Ghose's *bhita*. It appears to us, therefore, that Mr. Justice Coxe was in error in disturbing the judgment of the District Judge, Mr. Sasi Bhusan Chowdhury. We must accordingly set aside the judgment of Mr. Justice Coxe and restore the decree of the District Judge.

The respondent must pay the costs of the two appeals in this Court.

A. T. M.

Appeals decreed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

DURGA CHARAN MAHTO

v.

RAGHUNATH MAHTO AND OTHERS.*

Custom—Essentials—Proof necessary—Law, question of.

If a party rely upon a special custom of a family, to take the succession out of the ordinary Hindu Law, such custom must be proved to be ancient and continuous.

Ramalakshmi v. Sivanatha (1) followed.

The custom must be very satisfactorily proved by evidence of particular instances, instances so numerous as to justify the Court in finding in favour of the custom.

Gopal v. Harnant (2) followed.

* Appeal from Appellate Decree No. 1170 of 1911, against the decree of D. H. Kingford, Esq., Judicial Commissioner of Ohota Nagpur, dated the 18th February, 1911, reversing that of Babu Monmotho Nath Mullick, Munsiff of Ranchi, dated the 12th May, 1910.

(1) (1873) 14 Moo. I. A. 570; 17 W. R. 552. (2) (1879) 1 L. R. 3 Bom. 278.

CIVIL.

1918.

Ramtaran

Harl Charan.

Jenkins, O. J.

CIVIL.

1918.

March, 28.
April, 7.

CIVIL.

1918.

Durga Charan

v.
Raghunath.

Whether certain events did or did not happen, is a question of fact; but whether the facts so found do or do not establish a custom, is a question of law to be determined by the High Court in second appeal.

Appeal by the Plaintiff.

Suit for declaration of title to immovable property and for recovery of possession thereof.

The parties were descended from a common ancestor. The substantial question in controversy was whether the family was or was not governed by the rule of primogeniture. The primary Court passed a decree for one-third share in the family estate. The lower appellate Court dismissed the suit on the ground that the plaintiff as the youngest son of his father was not entitled to claim any share in the family properties.

Babu Kshetra Mohan Sen for the Appellant.

Babu Probodh Chunder Mukerjee for the Respondents.

The judgment of the Court was delivered by

April, 7.

Mookerjee J.—This is an appeal by the plaintiff in a suit for declaration of title to immovable property and for recovery of possession thereof. The parties are descended from a common ancestor Satrugna Mahto who was governed by the Mitakshara School of Hindu law and died in 1846. He had three sons Chandi, Nageswari and Radhanath of whom the second Nageswari succeeded to the estate upon the death of his father. Nageswari died about the year 1864 and left two sons Ram Charan and Sridhar. Ramcharan died in 1904. He had four sons, Krishna who predeceased him in 1896, Narayana, Gurucharan who died in 1906 and Durga Charan who is the present plaintiff. The first two defendants are the sons of Krishna and the next three defendants are the sons of Narayana. The Court of first instance overruled the contention of the plaintiff that the parties were subject to the Dayabhaga School of Hindu law but found in his favour that he was entitled to an one-third share in the family estate. This in fact negatived the defence that the family was governed by the rule of primogeniture. Upon appeal, the Judicial Commissioner has reversed the decision of the Court of first instance and dismissed the suit on the ground that the plaintiff as the youngest son of his father was not entitled to claim any share in the family properties. The substantial question in controversy between the parties, consequently, is whether this family is or is not governed by the rule of primogeniture.

On behalf of the respondents, it has been contended that the

question is essentially one of fact and consequently not liable to be examined in second appeal. This proposition is in our opinion too broadly formulated. Whether certain events did or did not happen is no doubt a question of fact upon which the decision of the lower appellate Court is binding upon us; but whether the facts so found do or do not establish the alleged custom, is plainly a question of law to be determined by this Court. Besides, as will presently be seen, the judgment of the Judicial Commissioner is based upon evidence not admissible in law, and must, on that ground alone, be deemed unsustainable.

CIVIL.
1913.
Durga Charan
v.
Baghunath.
Mookerjee, J.

When we examine the written statement of the defendants, we find that the alleged custom is set out in the following terms: "It is the custom observed from a long time past in the families of the plaintiff, the defendants and other Kurmis of purgana Silli and other purganahs of the provinces of Chota Nagpore, that the eldest son becomes proprietor of the entire village and the remaining sons get something for their maintenance according to the family capacity." This statement, it will be observed, does not clearly specify, whether the custom alleged is a family custom, or a local custom, or a class custom. Apparently the case for the defence is that the alleged custom falls within all three categories.

In so far as a family custom is alleged, the facts found are not only not sufficient to establish the custom, but they do in reality negative it. It was pointed out by the Judicial Committee in the case of *Ramalakshmi Ammal v. Sivanantha Perumal* (1), that if a party rely upon the special custom of a family, to take the succession out of the ordinary Hindu law, such custom must be proved to be ancient and continuous. The rule is formulated in substantially the same terms in *Harpershad v. Shao Dyal* (2), namely, that custom is a rule which, in a particular family or in a particular district, has from long usage obtained the force of law; it must be ancient, certain and reasonable, and being in derogation of the general rule of law, must be construed strictly. To similar effect, is the statement of Chief Justice Tindal in *Tyson v. Smith* (3): "It is an acknowledged principle that to give validity to a custom—which has been well described to be an usage—which obtains the force of law and is in truth the binding law within the particular district or at a particular place of the persons and things which it concerns, it must be certain, reasonable

(1) (1873) 14 M. I. A. 570; 17 W. R. 552 (2) (1876) L. R. 3 I. A. 259 (255.)

(3) (1838) 9 Ad. & E. 403 (431); 48 R. R. 523 (550.)

CIVIL.

1918

Durga Charan

v.

Raghunath.

Mookerjee, J.

in itself, commencing from time immemorial, and continued without interruption." See also *Vayidinada v. Appu* (1). Consequently, the defendants must establish that the alleged custom, if it is a family custom, has been continuous. Now, in so far as, upon the death of the Nageswari, the property was taken by Ram Charan to the exclusion of his younger brother Satrugna, the circumstance is undoubtedly in favour of the defendants. But this solitary instance, is not by itself sufficient to establish the alleged custom: *Sarabjit v. Indarjit* (2). It is worthy of note that in the case of *Chandika Bakhsh v. Muna Kunwar* (3), their Lordships of the Judicial Committee declined to find in favour of an alleged custom upon evidence which consisted of four modern instances. As pointed out in the case of *Gopal v. Hanmant* (4), the alleged custom must be very satisfactorily proved by evidence of particular instances, instances so numerous as to justify the Court in finding in favour of the custom. Here, as we have already said, only one instance, consistent with the alleged custom, has been established. On the other hand, we meet with instances in which the custom would have been recognised, if it did really exist, but the course of succession was contrary to the alleged custom. It is significant that the defendants alleged that Nageswari was the eldest son of Satrugna and succeeded as such to his estate. The Courts below have found concurrently against their allegation. They now turn round and contend that Nageswari succeeded because his eldest brother relinquished his claim in his favour. This was not only not their case in the Court of first instance but is contradictory to the case sought to be then established. The cases of *Chutturdharee v. Telukdharee* (5) and *Feetmath v. Lokenath* (6) to which reference was made in the course of argument, are clearly of no assistance to the respondents. Consequently the alleged custom, if it is a family custom, has not been established.

The question next arises whether the alleged custom, if it be deemed a local or a class custom, has been proved upon the facts found by the Courts below. The Judicial Commissioner has relied principally upon a judgment of an Assistant Settlement Officer delivered in the course of proceedings under Chapter XII

(1) (1881-5) I. L. R. 9 Mad. 44.

(2) (1904) I. L. R. 27 All. 203.

(3) (1901-2) I. L. R. 24 All. 273; L. R. 29 I. A. 7.

(4) (1879) I. L. R. 8 Bom. 273.

(5) (1889) 8 Mac. Sel. Rep. 326; 7 Ind. Dec. O. S. 910.

(6) (1878) 19 W. R. 289.

CIVIL.

1918.

Durga Charan

v.

Raghunath,

Mookerjee, J.

of the Chota Nagpore Tenancy Act. It has been pointed out that the present suit was instituted on the 18th September 1909 while the judgment mentioned was delivered by the Assistant Settlement Officer at the attestation stage on the 5th January 1910, and that the record of rights in accordance therewith was finally published so late as the 6th March 1911. This fact naturally affects the value and importance of the decision of the settlement authorities. But, apart from this circumstance, it is clear that the judgment of the Settlement Officer has been used for a purpose for which it is not admissible under the law. Reliance might possibly have been placed upon the judgment to show that the custom was recognised by the revenue authorities. But the findings of the Settlement Officer cannot be incorporated into the evidence in this case and treated as practically conclusive between the parties. It is further worthy of note that the Settlement Officer relied upon information gathered by him from the *tahsildar* of the Silly estate. Whether the Settlement Officer was competent to act upon information so obtained, which was clearly not legal evidence, may be a question for consideration; but it is plain that the Judicial Commissioner was in error when he based his decision upon this statement of the *tahsildar* who had not been examined as a witness in this litigation. It cannot be disputed, therefore, that the judgment of the Judicial Commissioner is based upon material not admissible in law. But even if the material is used, how far does it carry the case of the defendants? The statement of the *tahsildar* is to the effect that the custom of primogeniture exists in 82 out of 84 villages comprised in the Silly estate under which the parties to the present litigation hold their tenancies. The alleged custom, treated as a local custom, is not prevalent in all the villages, and if admittedly it does not prevail in two of the villages, an inference cannot very well be drawn that it does prevail in the village in question. The conclusion is irresistible that the materials upon which the Judicial Commissioner has based his decree do not justify the inference he has drawn from them.

The result is that this appeal is allowed, the decree of the lower appellate Court set aside and that of the Court of first instance restored with costs throughout.

A. T. M.

Appeal allowed,

Before Mr. Justice Coxe and Mr. Justice Roy.

ARMAN SARDAR

v.

SATKHIRA JOINT STOCK COMPANY
LIMITED AND OTHERS.*

CIVIL.

1918.

June, 4.

*Provincial Insolvency Act (III of 1907), Secs. 16, 20 and 46 cl. (3)—
Appeal—Leave by the District Court—Occupancy holding, transferability
of—Holding, whether saleable or not—Judgment-debtor, whether entitled
to a decision before sale—Sale without such decision, whether valid.*

It is proper that leave to appeal under section 46 cl. (3) of the Provincial Insolvency Act should be given by the District Court when the order complained of is one finally deciding a question in controversy between the parties.

An order passed in the course of proceedings under the Insolvency Act, directing the sale of certain holdings, which were said to be occupancy holdings, at the risk of the purchaser in case the custom of transferability was denied by the landlord, without ascertaining whether the contention of the judgment-debtor that the property was exempted by the Code of Civil Procedure from liability to attachment and sale within the meaning of section 16 of the Act was well founded or not, was illegal, and the sale was liable to be set aside. It was perfectly open to the insolvent judgment-debtor to raise the contention, and he was entitled to a decision on the point in controversy between the parties, i. e., whether or not the property was saleable.

Durga Charan Mandal v Kali Prasanna Sarkar (1) referred to.

Appeal by the Applicant.

Upon an application by the applicant Arman Sardar, he was adjudicated an insolvent by the additional District Judge of 24-Perganas, on the 5th February 1912; and the Nazir was appointed receiver of his property. On the 10th April, 1912, the insolvent judgment-debtor put in a petition stating that "he has occupancy right in the properties mentioned in the petition, and praying that the Nazir may not sell those properties." Upon receiving the Nazir's report thereon, the Court passed an order on the 24th August, 1912: "Let the holdings be sold at the risk of the purchaser, in case the custom of transferability is denied by the landlord."

On the 30th September, 1912, the Court after hearing the parties again passed the order that he saw no reason to disturb his previous order and he did not think that it was the duty of the Court to take evidence on the point of transferability of the holdings. The properties were directed to be placed

* Appeal from Original Order No. 576 of 1912, against the orders of A. Mellor, Esq., Additional District Judge of Twenty-four Perganas, dated the 24th August, and the 3rd October, 1912.

(1) (1899) I. L. R. 26 Cal. 727.

at the disposal of the receiver, and the insolvent's application was rejected. On the 3rd October, 1912, the Court gave permission to the insolvent to appeal against the order of the 24th August last. The Court further saw no reason to postpone the sale. And the properties were accordingly sold afterwards to the highest bidder. The applicant then preferred the present appeal to the High Court on the 2nd December, 1912.

Babus Biraj Mohan Majumdar and Dhirendra Krishna Ray for the Appellant.

Babus Braja Lal Chackerbutty and Haripada Chatterjee for the Respondent.

The judgment of the Court was delivered by

Coxe J.—This is an appeal against the order of the Additional District Judge at Alipore directing the sale of certain holdings which are said to be occupancy holdings at the risk of the purchaser in case the custom of transferability is denied by the landlord.

June, 4.

A preliminary objection is taken that no appeal lies. section 46 (5) of the Provincial Insolvency Act 1907 allows an appeal from any order other than those made under certain specified sections by leave of the District Court or of the High Court. In this case the District Court has given leave. It may perhaps be open to some doubt whether the District Judge should have passed this order at all inasmuch as it would appear from section 20 of the Act that the selling of the property lies within the discretion of the receiver. But there is no doubt that the District Judge has passed this order himself, and it appears to us that he acted very properly in giving leave to appeal, inasmuch as the order finally decided a question in controversy between the parties, namely, whether this holding could or could not be sold.

It appears to us that the order is wrong inasmuch as before the order could be passed it was necessary to ascertain whether the contention of the judgment-debtor that the property was exempted by the Code of Civil Procedure from liability to attachment and sale within the meaning of section 16 of the Act was or was not well founded. If this is an ordinary occupancy holding and there is no custom under which such holdings are saleable without the consent of the landlord, then it is perfectly open to the judgment-debtor to raise this contention and he is entitled to a decision upon it. We may refer to the decision in *Durga Charan Mandal v. Kali Prasanna Sarkar* (1). On the

CIVIL.
1913.
Arman Sardar
r.
Sankhira Joint
Stock Company Ltd.

CIVIL.

1913.

Arman, Sardar

Sathkira Joint
Stock Company Ltd.

Case, J.

other hand if there is such a custom or if there is not an occupancy holding it may well be that it is saleable in execution and that the sale is valid. But before anything further can be done the District Judge must come to a decision on the point in controversy between the parties.

Accordingly the appeal must be allowed and the sale set aside and the case will go back to the District Judge in order that he may come to a decision whether or not this property is saleable.

The costs will abide the result. We assess the hearing fee at two gold mohurs.

A. N. R. C.

*Appeal allowed, case remanded.**Before Mr. Justice Stephen and Mr. Justice Mullick.*

HARI MOHAN MISRA AND OTHERS

v.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL.*

CIVIL.

1918.

April, 29.

Bengal Tenancy Act (VIII of 1885), Secs. 104E, 104F, 104H—Settlement Rent Roll, entry in, correction of—Secretary of State for India in Council, suit against—Notice—Civil Procedure Code (Act V of 1909), Sec. 80—Objection to the entry under section 104E, whether sufficient notice.

In order to institute a suit against the Secretary of State for India in Council under section 104H of the Bengal Tenancy Act for correction of an entry in the Settlement Rent Roll, a formal and distinct notice setting out the necessary particulars as required by section 80 of the Code of Civil Procedure should be given, and in default of such notice being given the plaintiff's suit is incompetent and not maintainable.

An objection made to an entry in the Settlement Rent Roll under section 104E of the Bengal Tenancy Act is not a sufficient notice within the meaning of section 80 of the Code.

Appeal by the Plaintiffs.

Suit under section 104H of the Bengal Tenancy Act for correction of an entry in the Settlement Rent Roll.

Babu Jogendra Nath Mukherjee for the Appellants.*Babu Ram Charan Mitra* for the Respondent.

The judgment of the Court was delivered by

Stephen J.—The appellants in this case are the plaintiffs in a suit arising out of proceedings under part II chapter X

* Appeal from Original Decree No. 220 of 1911, against the decree of Babu Brish Chandra Mukherjee, Subordinate Judge of Rajshahye, dated the 17th February, 1911.

April, 29.

of the Bengal Tenancy Act. The settlement of rent roll was in progress under section 104. The publication took place under section 104E and the final publication took place under section 104F. Thereupon the plaintiffs seek to institute a suit under section 104H. The plaintiffs are described as tenure-holders in the settlement and there is no doubt that the Secretary of State is the landlord of the land in question which is part of a *khās mehal*. Under these circumstances the question arises whether the plaintiffs have given notice of their cause of action to the Secretary of State in accordance with section 80 of the Code of Civil Procedure. It is admitted that no formal notice under the section has been given; but the argument on behalf of the plaintiffs is that their objection under section 104E of the final publication under section 104F constitutes notice, of the cause of action, to the Secretary of State who was both a party to the suit and represented by the adjudicating officer. This argument is in our opinion unsound, as section 80 requires a separate, formal and distinct notice setting out the particulars mentioned in the section. In default of such notice being given the plaintiff's suit is incompetent and has rightly been dismissed on this ground by the lower Court.

The appeal is therefore dismissed with costs.

A. N. R. C.

Appeal dismissed.

APPELLATE CRIMINAL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

C. H. BOOTH

v.

EMPEROR.*

CRIMINAL.

1918.

July, 29, 30.
September, 1.

*Admissibility—Letter self-dissevering—Letter intercepted—'Import'—Bengal
Excise Act (V B. C. of 1909), Secs. 2 (19), 48, 61—Articles intercepted
by Customs House, if brought into Bengal.*

A letter written by an accused person, when self-dissevering is *prima facie* evidence against him, if it relates distinctly to a relevant point; it is not necessary that it should be signed; it is enough if it is traced to the writer, and it is admissible though it may have been intercepted or surreptitiously detained and opened and never in fact reached the addressee.

R. v. Derrington (1) followed.

* Criminal Appeal No 569 of 1918, against the order of Mr. Keys, second Presidency Magistrate of Calcutta.

(1) (1830) 2 O. and P 418.

ORIGINAL.

1913.

O. H. Booth

Emperor.

R. v. Cooper (1) referred to.

The fact that a reply from Porter & Co. posted immediately after the telegram purporting to be sent by O. Barker and referring to the telegram, was addressed to the accused, is a relevant fact under section 11 of the Indian Evidence Act and cogent evidence to show that the accused was the sender of the telegram.

The term 'import' as used in the Bengal Excise Act has a very wide significance.

Though an article may be actually within the geographical limits of Bengal, it cannot be said to have been brought into Bengal, if it has been intercepted at the Customs House.

Appeal against an order of the second Presidency Magistrate of Calcutta, convicting and sentencing the appellant to rigorous imprisonment for three months and a fine of one thousand rupees, for importing 491 ounces of cocaine without a license or pass. The appeal turned principally on the admissibility in evidence of certain letter, the contents of which are fully set forth in the judgment.

Mr. James and *Babu Manmatha Nath Mukerji* for the Appellant.

Mr. Pugh and *Babu Jatindra Mohon Ghose* for the Crown.

C. A. V.

The judgment of the Court was delivered by

September, 1.

Hookerjee J.—The appellant C. H. Booth was charged with the commission of an offence under section 46 of the Bengal Excise Act, 1909, inasmuch as he had imported 491 ounces of cocaine without a license or pass. He was tried by the second Presidency Magistrate of Calcutta, convicted, and sentenced to rigorous imprisonment for three months and payment of a fine of one thousand rupees.

The circumstances under which the appellant was convicted may be briefly stated in so far as they are disclosed by the evidence.

On the 23rd January, 1913, the Customs authorities discovered a large quantity of cocaine concealed in several bales of old clothes which had been exported from England by C. Porter & Co. by S.S. *Borneo* for delivery to the addressee, one Rasu Prasad. The invoice and bill of lading for the consignment had been made over by one Kalicharan Mukherjee to Cox & Co. in order that the goods might be cleared and passed through the Customs House. Kalicharan Mukherjee called at the office of Cox & Co., on the 23rd January to take delivery, and

was taken to the Customs authorities who had already discovered the cocaine secreted in the bales of clothes. What information enabled the Customs authorities to make the discovery has not been disclosed in the evidence and is not material for the purposes of the present case. It is sufficient to state that Kalicharan Mukherjee was prosecuted before the Chief Presidency Magistrate and was convicted. He moved this Court and obtained a Rule. The Rule has been discharged and the sentence affirmed, though the conviction has been altered to one under section 61 of the Bengal Excise Act, namely, the offence of attempting to import cocaine in contravention of the law. As already stated, the bill of lading showed that the goods were consigned by Porter & Co., to Rasu Prasad and bore the endorsements of both Porter & Co., and Rasu Prasad. The present appellant had ostensibly no connection with the incident, and we have not been told what circumstances led the investigating officers to suspect that the accused was in any way connected with the matter. We know this much only that on the 30th January 1913, an order was obtained from the Chief Presidency Magistrate to intercept all letters posted at Calcutta to the address of Porter & Co., of London, and on the 3rd of February a similar order was obtained for the interception of all letters addressed to the appellant. The result was that the investigating authorities intercepted a letter dated the 28th January, which was addressed to Porter & Co., and had been posted on the 29th January. This letter does not bear the signature of the writer, but evidence has been given to prove that it is in the handwriting of the accused. The letter has rightly been described by the Magistrate as a remarkable document and was in these terms :

" 23-1-13.

" Dear A

There is no news to send. There was nothing from you this mail, and I only hope you did not send any more goods after the Borneo, but fear this would be too good. From very patient enquiries from the highest sources, I find these people were given away by people they had quarrelled with, and so far as our work was concerned, there is no fault to find. The goods were passed by the appraisers and only examined in Messrs. Cox's godown on receipt of information. So, you see, had you only remained out here, as I arranged, we might still be carrying on a good business, beside having already done 40 per cent.

CRIMINAL.

1913.

O. H. Booth

Emperor.

Mookerjee, J

CRIMINAL.

1918.

O. H. Booth

Emperor.

Mookherjee, J.

better. I find, when my plans are not carried out, disaster follows, but it is idle to go over this ground again. As old clothes are finished with, the question now is, what new to try. I suggest remnants of cloth and also alpaca ; C in paper packets can be put in these rolls after a time. But I rely chiefly on quinine. Go to Messrs. Domoier & Co., 8 Harp Lane, London E. C. and ask them cost price for 1 lb., tins for export. Don't say, of India, because they have an agent here, or if you do say, for Karachi. Pack about 40 in a case, and let me have one case to commence with, addressed to Messrs. Smith & Co., Chemists, Jubbulpur. Of course, you must get another room somewhere, and call yourself something new—how would Allen & Co., Shippers and Agents, do? You should have new stationery printed. I shall clear this myself, and, in future, all goods, and store myself as well and all will be well. About the third lot of quinine should be loaded. Unfortunately, quinine is very dear now, but we can't help that. Some day we may make a profit on the quinine also ; all you have to [do is ?] to get some C packed in a soldered tin, well papered inside ; having slipped the quinine out of the outer paper, slip in the other tin and replace labels. A piece of clean wet blotting paper will remove all labels and enable you to do this quite easily. Better sell the press. Get the quinine packed in exactly similar boxes each time, nicely lined with paper, and don't fasten the top too tightly, but make all other sides very secure (with screws) ; this will cause examiners to open top lid only and the loaded tins will be at the bottom. I think this is a safe game. I expect our friend Mookherjee will get 3 months and he is making an awful outcry about it. Why he gave his own name, I don't know. The silly ass talks of appeals, and will spend thousands instead of getting it over quickly. I am very sick at the accident, and fearfully disappointed, but not surprised. How we shall ever get the present stock out, I don't know. Perhaps I will bring some myself some day. I can't think of any plan to get hold of already shipped stuff by transferring to Madras or recalling. But this you would have thought out a long time ago and will do your best about. In a case like this, the least said the better, and it only remains to make fresh plans. I shall never have any confidants in future—You and I only. I shall have a safe cache and sell myself according to the market ; a little that way is better than a lot the old way. Unluckily, the quinine plan does not deal with bottles. Hoping you are well.

Sincerely,

P.S.—But clear out of Bartholomew close at once. You might hear from Board of Trade otherwise, not to mention India office. But they can only bluster."

The first question for determination is, whether this letter was written by the accused. We have on the record several letters admittedly written by the accused, including one written by him to the Collector of Customs. The Magistrate has noticed the extraordinary general resemblance of handwriting in the case of the intercepted letter and the letter addressed to the Collector of Customs. There is also the evidence of Mr. Hardless that two-thirds of the intercepted letter is in the handwriting of the accused, though the expert is not equally sure as to the remaining one-third. It is patent, however, that the whole of the intercepted letter was written by one person. We have further the evidence of an assistant in the Mercantile Bank who is perfectly familiar with the handwriting of the accused as one of the customers of the Bank. We feel no doubt upon the whole evidence that the intercepted letter was written by the accused. The next question which arises is, whether the letter refers to the incident of the 23rd January 1913. Upon this point, there is really no room for controversy. The letter plainly refers to the seizure of the cocaine on S.S. *Borneo*, and there is no suggestion that there was any other consignment by the same steamer which was seized about the same time. There is also no doubt that the "friend Mookherjee," mentioned in the letter, is Kalicharan Mukherjee who was prosecuted in connection with the same incident and convicted. We have, consequently, the two facts that the letter was written by the accused and that the incident mentioned therein is the discovery and seizure of the consignment of cocaine concealed within old clothes on S.S. *Borneo* on the 23rd January, 1913. It is obvious that the letter is, in these circumstances, admissible against the accused, though it may have been intercepted. It is well settled that a letter written by an accused person, when self-disserving is *prima facie* evidence against him, if it relates distinctly to a relevant point; it is not necessary that it should be signed; it is enough if it is traced to the writer, and it is admissible though it may have been intercepted or surreptitiously detained and opened: *R. v. Derrington* (1).

We have next to consider the effect of the contents of the letter. It has been argued by learned Counsel for the accused

CRIMINAL.

1518.

O. H. Booth

v.

Emperor.

Mookherjee, J.

CRIMINAL.

1918.

C. H. Booth

v.

Emperor.

Mookerjee, J.

that the recitals in the letter do not show that the writer was the importer of the cocaine, and in this connection an elaborate argument has been addressed to us as to the relative rights of a consignor and a consignee under a C. F. I. contract. The question raised, however interesting it may be, does not affect the matter before us. The point for determination is, whether the accused has imported cocaine in contravention of the Bengal Excise Act. The term "Import" as used in the Statute has a very wide significance, for under clause (12) of section 2, the term 'import' means "to bring into Bengal." The contents of the letter make it manifest that the accused imported the cocaine into Bengal or at least attempted to do so; it is immaterial for our present purpose to enquire whether he was the consignee and whether the title to the goods had vested in him under the terms of the contract between him and the exporters. It is worthy of note that the accused states in the letter that if the addressee had only remained in this country as suggested by him, "they might still be carrying on a good business." He then proceeds to discuss with some elaboration future plans of work and possible modes of importation of cocaine with the least chance of detection. It has also been argued that in the most unfavourable view, the accused was the partner of Porter & Co. and consequently an exporter from England and not an importer into Bengal. The answer to this argument is that he may have been both exporter and importer, and it is plain, that whether he was an exporter or not, he was an importer. We are convinced that the accused did attempt to import cocaine in contravention of the law, though it may not be possible, on the evidence as it stands, to determine with precision the extent of the benefit that would accrue to him upon a successful venture. In this view, it is needless to consider in detail the other evidence on the record, which, in our opinion, materially confirms the conclusion at which we have arrived. But we may mention that there is satisfactory evidence to show that on the day following the discovery of the cocaine by the Customs authorities, telegrams were sent by C. Barker, 71 Canning Street, to Portanigra, London, and Applebaum Grodnow, each containing a single word "Milla." What this term means has not been proved, but it has been plausibly suggested on behalf of the prosecution that it was intended to signify 'discovered.' It has been proved that 71, Canning Street is the business address of the accused, and in this Court as also in the Court below a remarkable similarity was

CRIMINAL

1913.

C. H. Booth

v.
Emperor.

Hooker, J.

*noticed between the admitted handwriting of the accused and the signature C. Barker on the telegraph forms. It has also been proved that a man named Applebaum was a partner of the accused, while the term Portanigra is the telegraphic address of Porter & Co., the exporters of the cocaine. These circumstances, though not conclusive by themselves, do undoubtedly tend to throw very important light on the case. We have further two other letters posted in England and addressed to the accused, which were intercepted in the Post Office. One of these is dated 24th January 1913, and states "Your Milla received." This fits in precisely with the telegram sent on the morning of the 24th January 1913. The effect of this piece of evidence against the case for the defence was fully appreciated by the learned Counsel for the appellant, and he contended that the letter addressed to the accused was not admissible in evidence. But we are of opinion that this contention is not well-founded and is opposed to the decision in *R. v. Cooper* (1). In that case, A was charged with obtaining and attempting to obtain money by false pretences from four persons by an advertisement offering employment to all who sent him one shilling in stamps. Letters from 281 other persons, expressed to be in answer to the advertisement, and each enclosing twelve one penny stamps were held admissible, although the letters had been intercepted at the Post Office and had never in fact reached A, and could consequently be deemed at best only constructively in his possession. In the case before us, the fact that a reply from Porter & Co. posted immediately after the telegram purporting to be sent by C. Barker and referring to the telegram, was addressed to Booth, would be a relevant fact under section 11 of the Evidence Act and cogent evidence to show that Booth was the sender of the telegram. Upon a consideration of the entire evidence on the record we are fully satisfied, notwithstanding the very able argument addressed to us by Mr. Langford James, that the accused did attempt to import the cocaine which was seized on S.S. *Borneo* on the 23rd January 1913. There is only one other point which requires consideration, namely, can the accused be held as the Magistrate has done, to have imported cocaine, when as a matter of fact the cocaine was seized by the Customs authorities and was never delivered to him. In our opinion, upon the facts found, he is guilty of an attempt to import rather than of actual importation. Though an article may be actually within

(1) (1875) 1 Q. B. D. 19,

CRIMINAL:

1918.

O. H. Booth

v.

Emperor.

Mookerjee, J.

the geographical limits of Bengal, we do not think it can be said to have been brought into Bengal, if, as happened here, it has been intercepted at the Customs House. Consequently, the accused is liable to be convicted, not of an offence under section 46 but of an attempt to commit the offence of importation under section 61 read with section 46 of the Bengal Excise Act. We alter the conviction accordingly, but confirm the sentence and dismiss the appeal. The accused must surrender and serve out the remainder of the term of sentence as imposed by the Magistrate.

A. T. M.

Appeal dismissed.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

CRIMINAL:

1918.

July, 17, 18.

AKRAM ALI AND OTHERS

v.

EMPEROR.*

Original Procedure Code (Act V of 1898), Secs. 236, 237—Offences committed.

The application of section 237 of the Code of Criminal Procedure is restricted to the case mentioned in section 236. Section 236 applies only to a case in which there is a single act or a series of acts of such a nature that it is doubtful which of several offences is constituted by the criminal act or acts. Hence when there is no doubt as to the offence committed, neither section 236 nor section 237 can apply.

The accused Jonab Ali was convicted by the Sessions Judge under section 304 of the Indian Penal Code, Asmat Ali under section 326 of the Indian Penal Code and Akram Ali under section 304 of the Indian Penal Code, read with section 34. Akram Ali was charged under section 304 read with sections 149 and 148 of the Indian Penal Code; but these charges failed. The Sessions Judge found that the common intention attributed by the complainants to the party of the accused had not been established and there was no unlawful assembly. The question arose whether the case fell within section 237 of the Code of Criminal Procedure.

Mr. A. K. Fazlul Huq for the Accused.

Mr. Bagram for the Crown.

The judgment of the Court was delivered by

July, 18.

Mookerjee J.—This is an appeal by three persons Jonab Ali, Asmat Ali and Akram Ali who have been convicted by the

* Criminal Appeal No 824 of 1913

Sessions Judge, the first under section 304 of the Indian Penal Code, the second under section 326 of the Indian Penal Code and the third under section 304 of the Indian Penal Code read with section 34 of the Indian Penal Code. The occurrence took place on the morning of the 12th December 1912 and arose out of a land dispute, in the course of which one Torab Ali was killed while other persons received more or less serious injuries. The case for the prosecution was that the accused were the aggressors, that the party of the complainants was in peaceful possession of the disputed land and that the accused formed themselves into an unlawful assembly with the object of forcibly taking away paddy grown by the complainants. On these allegations, charges were drawn up against the several accused persons. Akram Ali was charged under section 304 read with section 149, and section 148 of the Indian Penal Code. Jonab Ali was charged under sections 302 and 304 of the Indian Penal Code; Asmat Ali was charged under sections 302, 304 read with section 149, 148 and 326 of the Indian Penal Code.

In so far as Jonab Ali is concerned, he has been convicted under section 304 of the Indian Penal Code and sentenced to rigorous imprisonment for four years. The Sessions Judge has found that he inflicted the fatal injury upon Torab Ali. The evidence upon this point is conclusive and the finding has not been challenged on behalf of the appellant. But it has been argued that Jonab Ali is not guilty of any offence, because he acted in the exercise of his right of private defence. In our opinion, this plea has not been established. In the first place, there was no occasion for the exercise of the right of private defence of property. The Sessions Judge has found that the accused were in possession of the field, that they had grown the crops, and that the object of the complainants was to prevent them from cutting the crops they had grown. It is obvious therefore, that there was no occasion for the exercise of the right of private defence of property. In the second place, it is equally plain that there was no occasion for the exercise of the right of private defence of person. Jonab Ali stated in the cross case which he instituted that he had been attacked by a person other than Torab Ali. But what is known, there is no evidence to show that he was so surrounded by the complainants as to justify a reasonable apprehension of the safety of his own person. No foundation has thus been laid to support the theory that Jonab Ali acted in the exercise of his right of private defence of person

CRIMINAL.

1918.

Akram Ali

v.

Emperor.

Mookerjee, J.

CRIMINAL.

1918.

Akram Ali

v.

Emperor.

Hookerjee, J.

or property. On the other hand, it has been abundantly made out that he had anticipated that there would be obstruction by the complainants, that he had gone to the field armed with spear, that he kept it concealed amongst the crops and that as soon as there was a dispute, he used the spear to inflict a mortal wound on Torab Ali. Consequently so far as he is concerned, the conviction and sentence must be affirmed.

In so far as Asmat Ali is concerned, it is proved conclusively that he stabbed the man named Madan. He has been convicted under section 326 of the Indian Penal Code. There is no foundation laid for the theory that he inflicted the injury upon Madan in the exercise of the right of private defence of person and property. The conviction and sentence, in his case, must be affirmed.

There remains the case of Akram Ali, who has been convicted under section 304 read with section 34 of the Indian Penal Code. The charge against him under section 304 read with section 149, as also the charges under sections 148 and 149 have failed. The Sessions Judge has found that the common intention attributed by the complainants to the party of the accused has not been established and that there was no unlawful assembly. The question thus arises, whether Akram Ali can properly be, as he has been, convicted under section 304 read with section 34 of the Indian Penal Code. Section 34 lays down that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. It is important to observe that the criminal act must be done in furtherance of the common intention of the several persons mentioned in the section. In the case before us, the common intention imputed to the persons assembled has not been established. Consequently the reason why the Sessions Judge could not convict the accused under section 304 read with section 149, applies if the accused is sought to be convicted under section 304 read with section 34 of the Indian Penal Code. But it has been argued by the learned Counsel for the Crown that the case falls within section 237 of the Criminal Procedure Code. That section provides as follows: "If, in the case mentioned in section 236, the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section he may be convicted of the offence which

he is shown to have committed, although he was not charged with it." The application of this section is, by its express terms, restricted to the case mentioned in section 236, which lays down that if a single act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences. Section 236 consequently applies only to a case in which there is a single act or a series of acts of such a nature that it is doubtful which of several offences is constituted by the criminal act or acts. In the case before us, no doubt arises as to which of several offences the accused has committed, if the facts as alleged by the prosecution are established. The difficulty has arisen not because it is doubtful which of several offences the accused has committed but because it is doubtful what part, if any, he has taken in the occurrence. As we have seen, the case for the prosecution has failed; their allegation that the complainants were in possession and that the accused constituted themselves into members of an unlawful assembly with a view to take away by force the paddy grown by the complainants, has not been established by the evidence. The facts found by the Sessions Judge are, that the accused were in possession, that they intended to cut the crops grown by themselves and that they were obstructed by the complainants. In a case of this description, where there is no doubt as to the offence, if any, committed, provided the facts alleged are established, neither section 236 nor section 237 can have any possible application.

It has finally been argued on behalf of the Crown that section 109 of the Indian Penal Code may be of assistance to the prosecution. That section provides that whoever abets any offence shall, if the acts abetted is committed in consequence of the abetment and no express provision is made by the Code for the punishment of such abetment, be punished with the punishment provided for the offence. It is plain, however, that if section 109 be held applicable, the only offence, if any, committed in consequence of the abetment of the appellant, is one under section 323 of the Indian Penal Code. The evidence shows that the only direction which the appellant gave was that the aggressors should be beaten and sent away.

CRIMINAL

1918.

Akram Ali

v.

Emperor.

Mookerjee, J.

CRIMINAL

1918.

Akram Ali

v.

Emperor.

Mookerjee, J.

One witness states that Akram Ali gave the order to beat. Consequently section 109 is not sufficient to support the conviction under section 304 read with section 34 of the Indian Penal Code. We may add that if the evidence referred to were accepted and if the accused could be convicted under section 323 read with section 109, for such conviction, the sentence already undergone would be adequate.

The result is that so far as Akram Ali is concerned the appeal must be allowed and the conviction and sentence set aside.

A. T. M.

Appeal of Akram Ali allowed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

BAHARUDDIN MANDAL

v.

EMPEROR.*

CRIMINAL

1918.

August, 20.
September, 4.

Evidence, admissibility of—Previous incident, complaint as to—Evidence Act (I of 1872), Sec. 14—Indian Penal Code (Act XLV of 1860), Secs. 365, 366.

An accused cannot be convicted of the offence charged against him simply because he has been guilty of another offence. When such evidence is offered to prove his commission of the offence on trial, evidence of his participation, either in act or design, in commission or preparation, in an independent crime cannot be received; in other words, proof cannot be offered of such independent offence to show that by reason of such independent offence the accused is more likely to have committed the one for which he is on trial; evidence of such collateral offence cannot be received as substantive evidence of the offence on trial. Evidence, however, may be given to prove the elements mentioned in section 14 of the Indian Evidence Act (intention and like matters).

Evidence of previous incident is inadmissible in cases coming under section 366 of the Indian Penal Code. But when the charge is under section 365 of the said Code, the fact that a complaint was preferred against the accused in respect of the first incident, will be relevant as furnishing evidence of a motive for confining the person.

To support a conviction under section 365 of the Indian Penal Code, it must be clearly proved that, at the time of the abduction, it was the intention of the accused to secretly and wrongfully confine the person.

The accused was charged with the commission of offences under sections 148, 365 and 366 of the Indian Penal Code. The questions in appeals were *firstly*, whether evidence of previous conviction or incident was admissible, and, *secondly*, whether the

* Criminal Appeal No. 688 of 1918, against the order of G. S. Dutt, Esq., Sessions Judge of Pabna and Bogra, dated the 28th May, 1918.

conclusion as to the guilt of the accused was supported by the evidence on the record. The facts are sufficiently stated in the judgment.

Babu Birbhusan Dutt for the Appellant.

Mr. Caspersz for the Crown.

The judgment of the Court was delivered by C. A. V.

Mookerjee J.—The accused Baharuddin Mandal was charged with the commission of offences under sections 148, 365 and 366 of the Indian Penal Code. He has been convicted under sections 148 and 365, but acquitted under section 366 of the Indian Penal Code. Under section 148, he has been sentenced to rigorous imprisonment for three years and under section 365 to rigorous imprisonment for seven years, the sentences to run concurrently.

The case for the prosecution, as sought to be established by the evidence, may be briefly narrated. The complainant, Kanu Mandal, in September 1911, married in Nika form one Sheolai Aurat. The accused is a very rich man of the village Baulapara where Kanu resided with his newly married wife. On the 10th October, 1911, Baharuddin, assisted by several men, attempted to break into the house of the complainant and to carry his wife away by force. The attempt was unsuccessful; but the complainant's father Kali Mandal, since deceased, laid an information at the police station on the day after the incident. The accused absconded in order to evade arrest and trial. About two months later, however, on the 10th December 1911, he appeared with a large body of persons before the house of the complainant who was at the time away at the fair which is held on Sunday afternoons. There were in the house at the time the father of the complainant and the women of the family. The accused remained outside the house, while three of his co-adjutors went inside and forcibly dragged out Sheolai. The girl caught hold of a post which was broken in the struggle and she was carried off. The old father of the complainant made an ineffectual attempt at resistance; he received a cut on his hand from one of the assailants, but he was able to cause a wound on the hand of one of the aggressors. The accused and his companions then carried away the girl, and the occurrence was witnessed by some of the villagers who were returning from the fair. About two weeks later, the girl was discovered in the house of one Murad Mandal, five or six miles from Baulapara. She came back with the headman of the village and joined her husband. On the 3rd July 1912, she disappeared again and since then her whereabouts

CRIMINAL.

1918.

Baharuddin Mandal

v.

Emperor.

September, 4.

ORIGINAL.

1913.

Baharuddin Mandal

v.

Emperor.

Mookerjee, J.

have not been discovered ; the suggestion is that she has again been carried off by or at the instance of the accused with a view to keep her away from the witness box. During all these months, the accused had not been in his home ; but he was arrested and prosecuted for attempt to abduct the girl on the 10th October, 1911. He was convicted and sentenced to rigorous imprisonment for three months ; attempts to have the conviction set aside by appeal to the Sessions Judge and by application for revision to this Court have been unsuccessful. The accused was then put on his trial for offences under sections 148, 365 and 366 of the Indian Penal Code in connection with the incident of the 10th December 1911, when the girl was actually carried away. He has been convicted and sentenced as already stated. The conviction has been assailed before us on the ground that the Sessions Judge ought not to have admitted evidence of the previous conviction or incident, and that his conclusion as to the guilt of the accused is not supported by the evidence on the record.

In so far as the fact of conviction of the accused on account of the incident of the 10th October, 1911 is concerned, the conviction has not been legally proved ; no copy of the order has been produced. It is also plain that evidence could not have been given of the previous conviction under section 54 of the Indian Evidence Act. Evidence, however, has been given by eye-witnesses of the occurrence of the 10th October, 1911, and the question arises, whether such evidence was admissible, namely, evidence that the accused did on that date attempt to carry off the girl. Reliance has been placed upon section 14 of the Indian Evidence Act to show that the evidence was admissible. That section provides that facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill will or good will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant. Illustration (2) is in these terms : “ A is charged with shooting at B with intent to kill him ; in order to show A's intent, the fact of A's having previously shot at B may be proved.” This illustration which is based on the decision in *R. v. Voke* (1) is in principle like illustration (c) which is in these terms : “ A is tried for the murder of B by intentionally shooting him dead ;

(1) (1828) R. & B. 581,

the fact that A, on other occasions, shot at B is relevant as showing his intention to shoot B." The section as also the illustrations do not carry the doctrine far enough to assist the contention of the Crown; the evidence is held admissible, not to prove that A did shoot at B but only to prove the intention of A; the act ascribed to him is assumed to have been otherwise established. The distinction may be subtle but is quite intelligible: See the judgment of the Judicial Committee in *Makin v. Attorney-General* (1). To put it broadly, an accused cannot be convicted of the offence charged against him simply because he has been guilty of another offence. When such evidence is offered to prove his commission of the offence on trial, evidence of his participation, either in act or design, in commission or preparation, in an independent crime cannot be received; in other words, proof cannot be offered of such independent offence to show that by reason of such independent offence the accused is more likely to have committed the one for which he is on trial; evidence of such collateral offence cannot be received as substantive evidence of the offence on trial. Evidence, however, may be given to prove the elements mentioned in section 14 of the Indian Evidence Act (intention and like matters). From this point of view it was ruled in *R. v. Lloyd* (2), that where A is charged with assaulting B with intent to ravish, evidence that on former occasions A took liberties with B was not admissible. In so far as the charge under section 366 is concerned, evidence of the previous incident is clearly inadmissible. But in so far as the charge under section 365 is concerned, the fact that a complaint had been preferred against the accused in respect of the first incident, would be relevant as furnishing evidence of a motive for confining the girl; but how far the facts constituting the first incident would be admissible, is open to question. The point however is immaterial, because, even if the evidence be excluded, we feel no doubt as to the merits of the case.

The events of the afternoon of the 10th December have been narrated by three eye-witnesses, one of whom alone is shown to be in any way connected with the complainant, the other two witnesses have been believed by the Sessions Judge and by one of the assessors, and we see no reason to distrust their testimony. That the girl was forcibly carried away that afternoon from the home of her husband is established beyond all doubt, and we are of opinion that it has also been satisfactorily

CRIMINAL

1918.

Baharuddin Mandal

v.

Emperor.

Mookerjee, J.

(1) (1894) A. C. 57 (65).

(2) (1886) 7 C. & P. 818.

CRIMINAL.

1918.

Baharuddin Mandal.

v.
Emperor.

Mookerjee, J.

proved that the present accused was the leader in that affair. The day and the time had been carefully selected; the male population of the village would at the time be away at the market and the girl would practically be unguarded and helpless. We have further the significant fact that the accused absconded, and his absence from home has not been satisfactorily accounted for; this is a relevant circumstance as is shown by illustration (c) to section 9 of the Indian Evidence Act. The accused has been rightly convicted under section 148 of the Indian Penal Code, but we are of opinion that the conviction under section 365 cannot be supported. The circumstances of the case make it plain that the girl was abducted, not with intent to cause her to be secretly and wrongfully confined, but with intent that she might be forced or seduced to illicit intercourse. To support a conviction under section 365, it must be clearly proved that, at the time of the abduction, it was the intention of the accused to secretly and wrongfully confine her; this has not been established; on the other hand, we consider that the natural inference to be drawn is that the offence was prompted by lust. We must consequently alter the conviction to one under section 366 of the Indian Penal Code. The result is that the appeal is dismissed and the sentence affirmed.

A. T. M.

Appeal dismissed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Beachcroft.*

CRIMINAL.

1918.

July, 18, 21, 28.

NAFAR SHEIKH

v.

EMPEROR.*

Evidence, admissibility of—Infant under seven years, testimony of—Evidence Act (I of 1872), Sec. 118—Judge not interrogating infant witness, effect of—Witness, capacity of, to testify—Judge and Jury—Indian Oaths Act (X of 1873), Sec. 13—Criminal Procedure Code (Act V of 1893), Sec. 429—Restrictive order for admission of appeal, if valid.

An infant even though under the age of seven years may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath; in other words, a Court has to ascertain from the answers to questions propounded to such a witness, whether he appreciates the danger and implety of falsehood.

King v. Brasier (1) followed

* Criminal Appeal No 288 of 1918, against the sentence of S. C. Mullik, B. q., Sessions Judge of Nadia, dated the 23rd January, 1918.

(1) (1779) 1 Leach 199.

Before a child of tender years is questioned, the Court is not bound to test by preliminary examination his capacity to understand and to form an opinion as to the competency of the witness before the actual examination commences.

Dictum in *Fakir v. Emperor* (1) dissented from.

The mere circumstance that the Sessions Judge did not interrogate the witnesses, before the examination began, does not invalidate the trial.

The question of the capacity of a witness to testify is a question for the Judge himself to decide and not for the jury, although after he has decided in favour of the competency of a witness, it is for the jury to determine the amount of credit to be given to the statements made by such witness.

A restrictive order for admission of appeal, which is not contemplated by section 423 of the Code of Criminal Procedure, is *ultra vires*.

In this case the accused was convicted of an offence under section 376 read with section 511 of the Indian Penal Code. Three infants were examined but they had not made an affirmation as required by section 6 of the Indian Oaths Act. The Sessions Judge did not consider, whether those three witnesses were, by reason of their tender years, prevented from understanding the questions put to them or from giving rational answers to those questions, within the meaning of section 118 of the Indian Evidence Act.

Babu Debendra Nath Bagchi for the Appellant.

Mr. Bagram for the Crown.

C. A. V.

The judgments of the Court are as follows :

Mookerjee J.—The appellant, Nafar Sheikh, has been convicted of an offence under section 376 read with section 511 of the Indian Penal Code and sentenced to rigorous imprisonment for five years. The jury unanimously found him guilty, but recommended a light sentence on the ground that he is a young man and has got a young wife. The Sessions Judge accepted the verdict of the jury, but did not give effect to their recommendation for a light sentence. The appeal to this Court was in the first instance admitted by Harington and Coxe, JJ. for consideration of the sentence only, in view of the representation of the jury. The appeal thus admitted came to be heard by the Chief Justice and Sharfuddin, J., who held that, in view of the provisions of section 422 of the Criminal Procedure Code, 1898, the appeal could not be admitted on a limited ground, and directed the scope of the order of admission to be enlarged. As the direction thus given was not formally recorded, it is desirable to draw attention to the terms of sections 421 and 422 of the

CRIMINAL

1918.

Nafar Sheikh

Emperor.

July, 28

ORIGINAL.

1918.

Nafar Shetkh

v.

Emperor.

Mookerjee, J.

Criminal Procedure Code. Sub-section 1 of section 421 lays down that on receiving the petition of appeal, accompanied by a copy of the judgment or order appealed against or a copy of the heads of the charge in cases tried by a jury, under section 419 or section 420, the appellate Court shall peruse the same, and if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily. Section 422 then provides that if the appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal. It is plain that the appeal which has thus to be heard is the whole appeal; consequently, all the grounds taken in the petition of appeal are open for consideration at the final hearing, and the appellant cannot be restricted to any selected ground out of those specified in his petition. A restrictive order for admission is clearly not contemplated by section 422 and must be deemed *ultra vires*. This view is strengthened by a consideration of the terms of section 423. It is worthy of note that a similar view has been taken by this Court with regard to appeals under the Civil Procedure Code; *Srinibas v. Ramchandra* (1). Fresh notice of the appeal has been given to the Crown, and the appeal has been argued before us on behalf of the accused and the Crown.

The verdict of the jury has been assailed on behalf of the appellant as erroneous, by reason of three circumstances, namely, *first*, that the Sessions Judge allowed to be placed before the jury the evidence of three persons who had not made an affirmation as required by section 6 of the Indian Oaths Act, 1873; *secondly*, that the Sessions Judge has not considered, whether these three persons were, by reason of their tender years, prevented from understanding the questions put to them or from giving rational answers to those questions, within the meaning of section 118 of the Indian Evidence Act, 1872; and, *thirdly*, that the Sessions Judge has failed to call the attention of the jury to material portions of the evidence.

In support of the first ground, reliance has been placed upon sections 5 and 6 of the Indian Oaths Act. Section 5 provides that oaths or affirmations shall be made by all witnesses, that is to say, all persons who may lawfully be examined or give or

be required to give evidence by or before any Court, or by person having by law or consent of parties authority to examine such persons or to receive evidence. Section 6 provides that where the witness is a Hindu or Mahomedan, he shall, instead of making an oath, make an affirmation. In the case before us, the complainant Zobeda, a girl six years old, and, two other girls, Haliman and Moula, each four years old, were examined, though they did not make an affirmation. In fact, the Sessions Judge deliberately did not give them an opportunity to make an affirmation. The Judge appears to have assumed, without investigation, that the children were of so tender an age that they could not appreciate the value and significance of an affirmation. It is plain that the Judge should not have adopted this course. As was laid down in the case of *King v. Brasier* (1), an infant, even though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath; in other words, a Court has to ascertain from the answers to questions propounded to such a witness, whether he appreciates the danger and impiety of falsehood. The course pursued by the Sessions Judge has led to the result that these witnesses were examined in contravention of the provisions of Section 6 of the Indian Oaths Act. On behalf of the Crown, however, it was suggested that the irregularity in the proceeding, if any, may be shown, if necessary, to have been cured by the provisions of section 13 of the Indian Oaths Act. Section 13 lays down that no omission to make any affirmation shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission took place. In support of this view, reliance has been placed upon the decision of a majority of the Full Bench in *Queen v. Sewa Bhogta* (2). On behalf of the appellant, this position has been controverted, and it has been argued that where there is an omission by a witness to take an oath or to make an affirmation by reason of the deliberate act of the Court, section 13 is of no assistance. The question raised is by no means free from difficulty, as is amply indicated by the divergence of judicial opinion on the subject. In this Court, judicial opinion has not been uniform, as appears from an examination of the decisions in *Queen v.*

CRIMINAL.

1918.

Nafar Sheikh

v.

Emperor.

Mookerjee, J.

(1) (1779) 1 Leach 199.

(2) (1874) 14 B. L. R. 294, 23 W. R. Cr. 12

CRIMINAL,

1918.

Nasir Sheikh

v.

Emperor.

Mookerjee, J.

Itwarya (1), *Queen v. Anunto* (2) and *Queen v. Sewa Bhogta* (3), It is further worthy of note that in the case of *Nundo Lal v. Nistarini* (4), when it was argued on the authority of some of the decisions just mentioned that section 13 of the Indian Oaths Act applied to cases where the omission to take the oath or affirmation was the result of the deliberate act of the Court or of the witness, Sir Francis Maclean, C. J., with the concurrence of Mr. Justice Macpherson and Mr. Justice Hill, described the contention as at once novel and startling. There has been a similar divergence of judicial opinion in the other High Courts, as is indicated by the cases of *Queen v. Maru* (5), *Queen v. Lal Sahai* (6), *Empress v. Shava* (7), *Empress v. Viraperumal* (8). In view of this divergence of judicial opinion and of the course we propose to take with regard to the second ground urged by the appellant, I reserve my opinion upon the difficult question of the true scope and effect of section 13 of the Indian Oaths Act.

In support of the second ground, it has been contended that the record makes it reasonably clear that the Sessions Judge has not considered, whether the three girls mentioned, were, by reason of their tender years, prevented from understanding the questions put to them, or from giving rational answers to those questions. It has further been argued that under section 118 of the Indian Evidence Act, he was bound to ascertain, before these children of tender years were examined as witnesses, whether they had capacity to understand and to give rational answers. Reliance has been placed upon the decision in *Fakir v. Emperor* (9), which, it has been urged, is an authority for the proposition that it is obligatory upon a Judge to test the capacity of a witness of tender years by appropriate questions and to form his opinion as to the competency of such a witness, before the actual examination commences. It may be conceded that there are expressions in the judgment in the case mentioned which tend to support this broad statement; but, in my opinion, the proposition thus widely formulated is not justified by the terms of section 118 of the Indian Evidence Act. That section lays down that all persons shall be competent to testify, unless the Court considers

(1) (1874) 14 B. L. R. 54; 22 W. R. Or. 14.

(2) (1874) 14 B. L. R. 295 (Note); 22 W. R. Or. 1.

(3) (1874) 14 B. L. R. 294.

(8) (1888) I. L. R. 11 All. 183.

(4) (1900) I. L. R. 27 Calo. 428 (440)

(7) (1891) I. L. R. 16 Bom. 859.

(5) (1888) I. L. R. 10 All. 207.

(8) (1892) I. L. R. 16 Mad. 105.

(9) (1908) 11 O. W. N. 51

that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years. The legislature has not prescribed an inflexible rule of universal application to the effect that before a child of tender years is questioned, the Court must, by a preliminary examination, test his capacity to understand and to give rational answers and must form an opinion as to the competency of the witness, before the actual examination commences. In fact, the case of *Queen v. Whitehead* (1) shows that the incompetency of a witness may very well appear in the course of his examination-in-chief, and that the evidence of a witness so found to be incompetent may at that stage be withdrawn from the jury. The true rule on the subject is concisely stated by Brewer, J. in *Wheeler v. United States* (2), in these terms: "The decision of this question (whether the child witness has sufficient intelligence) primarily rests with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial Judge will not be disturbed on review, unless, from that which is preserved, it is clear that it was erroneous." The mere circumstance that the Sessions Judge did not interrogate the witnesses, before their examination began, with a view to test their capacity, does not, in the view I take of the true effect of section 118 of the Indian Evidence Act, invalidate the trial. But, in the present case, there are circumstances which, in my opinion, rendered it plainly desirable that such a course should have been pursued. In the first place, with regard to the girl Moula, the committing Magistrate had recorded the note that she was too young to make any rational statement, and, on this ground, he did not receive her testimony. In the second place, as regards the girl Zobeda, the committing Magistrate had recorded the note that "she can hardly give rational answers to questions put to her." It further appears from the record that, on the first day that Zobeda was examined before the Magistrate, she could not answer the questions put to her, though on the day following she gave full answers. In the third place, as regards all the three girls, Haliman, Moula and Zobeda, the Sessions Judge deliberately

(1) (1860) L. R. I. O. C. B. 33.

(2) (1894) 159 U. S. 523.

CRIMINAL

1913.

Nafis Sheikh

r.

Emperor.

Mookerjee, J.

CRIMINAL.

1918.

Nafar Sheikh

v.

Emperor.

Mookerjee, J.

omitted to follow the procedure prescribed by section 6 of the Indian Oaths Act; from this circumstance, the accused has invited us to draw the inference, that, in the opinion of the Judge, the children were of too tender an age to be able to appreciate the distinction between truth and falsehood and the significance of an affirmation. The record of the Sessions Judge, as already stated, does not throw any light on these points, and there is nothing to show that his attention was drawn to the remarks made by the committing Magistrate or that the provisions of section 118 of the Indian Evidence Act were present to his mind. Under these circumstances, I am of opinion that it would not be safe to affirm the conviction. I am not unmindful that the Sessions Judge did invite the attention of the jury to the circumstance that the girls had not made an affirmation; this observation was, however, made, not with a view to exclude their testimony but with a view to make the jury consider the question of the weight to be attached to their evidence. The question of the capacity of the witness to testify is a question for the Judge himself to decide and not for the jury, although after he has decided in favour of the competency of a witness, it is for the jury to determine the amount of credit to be given to the statements made by such witness. *Queen v. Hosseins* (1). The second ground urged by the appellant must consequently prevail. In this view, it is unnecessary to consider the third ground in detail, though I must state that I was not impressed by it.

The result is that this appeal is allowed, the conviction and sentence set aside, and the case remitted to the Sessions Judge to be retried in accordance with law. The three girls mentioned must be examined in conformity with the provisions of section 6 of the Indian Oaths Act and section 118 of the Indian Evidence Act. It may be usefully added that children of six or even five years of age, have been allowed to testify, upon the Court being satisfied as to their capacity to give rational testimony: *R. v. Holmes* (2), *R. v. Perkins* (3), *R. v. Brasier* (4).

Beachcroft J.—I agree that the conviction should be set aside and a retrial ordered, on the ground that it is not clear that some of the evidence, and that the most important evidence, was admissible. The remarks of the Magistrate regarding the children Moula and Zobeda raise a doubt as to their competency

(1) (1887) 8 W. R. Cr. 60.

(2) (1861) 9 F. & F. 788

(3) (1840) 2 Moody C. C. 185.

(4) (1779) 1 East. P. C. 448,

to testify and as the learned Judge does not appear to have considered the question from the point of view of section 118 of the Evidence Act, the conviction has been based on evidence the admissibility of which is doubtful.

I respectfully dissent from the dictum in *Fakir v. Emperor*(1) that the Judge must form his opinion as to the competency of a witness before his actual examination commences. In many cases it may be desirable to take that course, but to lay it down as a positive rule of law is to read words into section 118 of the Evidence Act which are not there.

In my opinion the question whether a witness understands the nature and obligation of an oath or affirmation is foreign to the question of competency to testify. Intellectual capacity is the only test. But the Judge was bound under the provisions of the Oaths Act to have an affirmation made by the witnesses. The effect of the omission in this instance it is unnecessary to discuss.

In regard to the arguments as to misdirection I desire to refer only to one point. It was argued that the Sessions Judge in his charge to the jury had not pointed out to them that the medical evidence was consistent only with a case of attempted rape and therefore contradicted the evidence of the girl. This reading of the medical evidence depends on the view that Vaginal penetration is necessary to complete the offence of rape. The extent of penetration required has not been defined in the Indian Penal Code, but it is open to argument whether vulval penetration, with which the medical evidence is consistent, is not sufficient to establish rape and whether accused ought not in this case to have been committed on a charge of the completed offence and not on a charge of attempt only. I express no opinion on this point for it was not argued before us.

A. T. M.

Appeal allowed: case remitted for retrial.

(1) (1906) 11 C. W. N. 51.

CRIMINAL

1913.

Nafar Sheikh

v.

Emperor.

Beachcroft, J.

Before Sir Asutosh Mookerjee Knight, Judge and Mr. Justice Beachcroft.

CRIMINAL,

1913.

July, 31.

SHAHEBER MA.

v.

EMPEROR,

AND

KHUSIR BAP

v.

EMPEROR.*

*Evidence, admissibility of—Statement of co-accused—Evidence Act (I of 1872)
Secs. 10, 30.*

When the inherent quality of the statement is not a confession, it cannot be used against the co-accused. Nor can the statement be used against him under section 10 of the Evidence Act, till it has been established that there is reasonable ground to believe that there was a conspiracy between two persons.

The accused were convicted under section 302 and section 302 read with section 109 of the Indian Penal Code respectively and sentenced to transportation for life.

The question raised in the appeal of Khusir Bap was whether the self-exculpatory statements made by Shaheber Ma could be used in evidence against him.

Babu Brojendra Nath Chatterjee for Shaheber Ma (No. 599.)

Babu Ambica Charan Das for Khusir Bap (No. 617.)

Babu Jyotis Chandra Haura for the Crown.

The judgment of the Court was delivered by

July, 31.

Mookerjee J.—These are appeals by two accused persons, who have been convicted under section 302 of the Indian Penal Code and section 302 of the Indian Penal Code, read with section 109 of the Indian Penal Code, respectively, and have both been sentenced to transportation for life. The facts as established by the evidence may be briefly stated.

The appellant Shaheber Ma is girl about 15 years old, and three years before the occurrence, was married to Issurulla. The couple did not get on well together and the girl, it is alleged, was not well treated by her husband and her mother-in-law; the result was that she frequently ran away from the home of her husband. About six months before the date of the occurrence, she went to reside with her paternal uncle Niyazamat Lalabunia, and her father also came to live there about the same time. While there, she contracted an intimacy with the other appellant Khusir Bap, an unmarried youth, about 20 years of age. He used to visit her while her father and uncle were away from the house,

* Criminal Appeals Nos. 599 and 617 of 1913.

CRIMINAL

1918.

Shaheber Ma

v.

Emperor.

Mookerjee, J.

so that in a short time the scandal spread and her father and uncle resolved that she should be taken back. On the evening of Friday, the 21st February last, she was brought back to the home of her husband. That night there was a feast in the house and amongst the guests invited was a *fakir* by name Nabia. The appellant Shaheber Ma cooked the fowl curry and served it to the guests. As soon as the guests had taken the food, several of them were taken ill and ultimately the *fakir* died. In the midst of the confusion which ensued, the appellant disappeared from the house and was subsequently discovered in the house of a Chowkidar. She is proved to have stated to more than one person that she did put into the food cooked by her a white substance given to her by the appellant Khusir Bap. Her story is that she was assured by her paramour, that if she administered the drug to her husband and mother-in-law, they would become submissive to her, would love her and no longer ill-treat her. Throughout the trial she has adhered to this statement and it has been duly proved by the Magistrate who recorded it. The other appellant, Khusir Bap, however, denies complicity in this transaction, and his defence is that the charge in so far as he is concerned is entirely unfounded.

The Sessions Judge has held upon the evidence that the appellant Shaheber Ma administered poison to the guests, and that she was aware that the substance she mixed with the food was a poisonous substance likely to cause death. On this finding he has convicted Shaheber Ma of an offence under section 302 of the Indian Penal Code. The Sessions Judge has also found that Khusir Bap gave the poison to Shaheber Ma in order that it might be administered to her husband and her mother-in-law. In this view, he has held Khusir Bap guilty of an offence under section 302 read with section 109 of the Indian Penal Code. These convictions have been assailed before us in two separate appeals.

In support of the appeal of Shaheber Ma, it has been urged that the only evidence against her is her statement, and that the facts as disclosed in the evidence taken along with the statement are consistent with her innocence. The case against her may be one of grave suspicion; but the question for consideration is, whether the circumstances established are inconsistent with her innocence. Her story is that the white substance was given to her by her paramour, not as a poison but as a charm which if taken by her husband and mother-in-law would bring them completely under her control. It is not disputed, indeed, it is fully established by

CRIMINAL.

1913.

Shabeber Ma

v.

Emperor.

Mookerjee, J.

the evidence on the record, that a belief is current amongst women in that part of the country that persons can be brought under control if certain drugs, which are supposed to act as a charm, are administered to them. As the appellant Shabeber Ma was ill-treated by her husband and mother-in-law, the credulity common amongst women of her class would lead her to administer to them a drug calculated to produce the desired result, the probability of such conduct on her part is increased, when we remember that she is young and is described in the evidence as rather weak in intellect. This view of the matter favours the theory of her innocence. On the other hand, the circumstance which goes against her is, that as the substance is alleged to have been given to her by her paramour, it is not likely that he would ask her to administer the substance to her husband and her mother-in-law merely with the view that they might be brought under control, he would, on the other hand, ask her to remove the most formidable obstacles in the way of their intrigue. But it must be remembered that her paramour might not be so ready to disclose his evil intentions to her; if he took her into his confidence, he might easily be betrayed by her. In our opinion, the story told by the girl is probable, namely, that he gave the substance to her to administer it to her husband and mother-in-law, and at the same time assured her that the result would be that they would be more friendly to her and more under her control than they had been in the past. This view has been sought to be strengthened by reference to the evidence of a witness who states that among the persons to whom the food was given by the accused were children loved by her, and, it has been urged that she could not be so depraved as to intend to kill them. This evidence is not very convincing; but the circumstance cannot altogether be overlooked that the food was, as a matter of fact, served not merely to the husband and the mother-in-law but also to a large number of persons against some of whom at least she had no grudge while to others she was possibly affectionately disposed. There is the further fact that the substance was mixed with the food the very evening she came back to the home of her husband; this may indicate that she was anxious to have the charm administered as early as practicable, because she knew well that, in view of her misconduct, she would be taken to task by her husband and her mother-in-law on the very first opportunity. We are of opinion on the whole that the case is by no means free from doubt and that the circumstances

mentioned are consistent with the innocence of the accused. The appeal of Shaheber Ma must consequently be allowed and the conviction and sentence set aside.

In support of the appeal of Khusir Bap (Cr. App. 617 of 1913) it has been urged that it stands on a much stronger basis than the appeal of Shaheber Ma. It is plain that the self-exculpatory statements made by Shaheber Ma cannot be used in evidence against Khusir Bap, under section 30 of the Indian Evidence Act; where, as here, the inherent quality of the statement is not a confession, it cannot be used against the co-accused. Nor can the statements be used against Khusir Bap under section 10 of the Indian Evidence Act, till it has been established that there is reasonable ground to believe that there was a conspiracy between the two persons to poison the husband and the mother-in-law of the girl. But no foundation has been laid in the evidence for this purpose. In so far as Khusir Bap is concerned, the only circumstance against him is that a pasty substance was found at the time of the search of his house which upon analysis was found to contain arsenic. But as, the Sessions Judge has pointed out, the analysis of this substance does not show what proportion of arsenic was contained in it and whether the proportion was such as to make the substance dangerous to human life. No doubt, there are two other important circumstances to be borne in mind, namely *first*, that Khusir Bap would gain by the death of the husband of the girl he loved; and *secondly*, that he was in a position to supply the poison. But against this must be set off the fact that the girl did not live in his house; she resided with her uncle and it has not been proved that it was impossible for her to receive the poisonous substance from any other sources. Under these circumstances we are of opinion that although as against Khusir Bap, the case is one of grave suspicion, the conviction cannot, upon the record as it stands, be possibly sustained. We cannot but feel that the prosecution would have acted more prudently if the case against Shaheber Ma had been withdrawn and she had been examined as a witness on behalf of the Crown in the trial of Khusir Bap. For the reasons assigned, however, his appeal also must be allowed and the conviction and sentence set aside.

A. T. M.

Appeal allowed.

CRIMINAL

1913.

Shaheber Ma

v.

Emperor.

Mookerjee, J.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

SHAMUL KISSORE ADDY

v.

RAI SAHEB GIRINDRA NATH MUKHOPADHYA.*

CIVIL,

1909.

May, 28.

Civil Procedure Code (Act V of 1908), Sec. 115—Revision by High Court of Small Cause Court decree—Findings of fact by original Court, if can be reviewed by the Full Court of the Small Cause Court.

Where an application was made to the Full Court of the Small Cause Court for a new trial on a question of fact :

Held, on revision by the High Court, that the Full Court is not precluded from reviewing the findings of fact of the original Court.

Application by the defendant to set aside the decree of the Full Court of the Small Cause Court, refusing to interfere with the finding of fact of the original Court on the ground that it had no authority to do so.

Mr. N. Sircar (with *Mr. B. C. Mitter*) for the applicant : submitted that the Full Court has ample authority to upset the original findings of fact and order a new trial. In fact, the Chief Judge expressed the opinion that on the evidence on record before him he might have dismissed this suit but said he had no authority to interfere with the findings of the original Court. He was clearly wrong.

Mr. S. R. Das for the plaintiff-respondent, showed cause.

May, 28.

Fletcher J.—This is a rule obtained by the defendant in the Small Cause Court suit, being Suit No. 21670 of 1908, calling upon the plaintiff to shew cause why under the provisions of sections 115 of the Civil Procedure Code of 1908 the decree made by the said Court in the said suit and dated the 24th February last, and the order made by the said Court on the new trial and dated the 16th April last, should not be set aside.

It appears that judgment was given against the applicant, who was the defendant in that suit, by Mr. Panioty, one of the Judges of that Court, on the 24th February last. The applicant then applied to the Full Court for a retrial under section 38 of the Presidency Small Cause Court Act. That application came on for hearing on the 16th April last before Mr. Pearson the Officiating Chief Judge and Mr. Panioty.

The petition upon which the Rule was granted and which was

* In the matter of section 115 of the Civil Procedure Code and in the matter of Small Cause Court Suit No. 21670 of 1908.

supported by an affidavit of Mr. Surita, the pleader states in para 7, as follows :

"That although the learned Chief Judge expressed the opinion that if the case had originally come before him he might have on the evidence on record dismissed the suit against your petitioner but he held he had no authority to interfere with the finding of the original Court on a question of fact, and in fact both the Judges composing the Full Bench before which this application was made were inclined to grant the same but could not do so for the aforesaid reason."

The affidavit of Mr. Surita, the pleader, for the applicant in support of the petition states in para 2 this :

"That although the said application (for new trial) was dismissed His Honor the Chief Judge did in my presence express the opinion that if the case had originally come before him he might have on the evidence on record dismissed the suit against my client, that is, the defendant Rai Saheb Girindra Nath Mukherjee, but that he was not authorised by the law to interfere with the finding of the original Court on a question of fact."

The affidavit put in by the plaintiff in answer seems to me not to answer the affidavit of Mr. Surita specifically on the point in so far as Mr. Surita swears that the Chief Judge said he was not authorised by law to interfere with the findings of the original Court on a question of fact.

The affidavit of the plaintiff in para. 5 says with reference to the allegations of the defendant and Mr. Surita this : "After a perusal of the said grounds I saw my pleader Mr. A. C. Bose at his house who is now ill and confined to bed and brought the said allegations to his notice and he informed me that he was certain there was no such expression of opinion from the Court and I who was personally present at the trial before the Full Bench emphatically deny that the learned Judges composing the Full Bench expressed the opinion aforesaid."

In the first place as to this emphatic denial of the plaintiff it appears from para. 3 of his affidavit that he had the petition and affidavit explained to him, so his emphatic denial of what the Chief Judge said is of not much value. It is important that the plaintiff although he is in the hands of experienced attorney and counsel has not thought fit to deny the statement of Mr. Surita that the Chief Judge said he was not authorised by law to interfere with the finding of the original Court on a question of

CIVIL,
1909.
Shanul Kinsore
v.
Girindra Nath.
Fletcher, J.

CIVIL

1909.

Shamul Kishore

P.
Girindra Nath.Fletcher, J.

fact. That view that the Chief Judge had no authority to go into the facts is wrong because there cannot be the slightest doubt that section 37 applies to new trials. Now on what grounds can a new trial be granted? One of the most important grounds for granting a new trial is for instance where in a case tried before a jury the Court does not take the same view as the jury.

It seems to me that the statements in Mr. Surita's affidavit being unchallenged I think the application must succeed. At the same time the Rule is in very wide terms. The original decree of Mr. Panioty must stand and the decision of the Full Court on the ground, as the Chief Judge said, he had no power to review the facts against the findings of the original Court, that order must be set aside and the case must go back to the Full Court to decide pursuant to law. If the matter comes back before the Full Court—it may be that the Judges may be of the same opinion upon a full consideration of the evidence in such way as they think fit but at present as the plaintiff has come here with the statements of Mr. Surita being unchallenged I can only make the Rule absolute, with costs.

Mr. Das—Rule made absolute to the extent of the decree being set aside.

The Court—Yes.

Messrs. Bonnerjee & Haldar.—Solicitors for the applicant.

S. C. R.

Rule made absolute.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.*

DURBIJOY MANDAR

v.

DAMAN BHAGAT.*

Limitation—Period from which time runs—Bengal Tenancy Act (VIII of 1886), Sec. III Art. 3 cl. (a)—Lease—Agricultural year—Non-occupancy raiyat—Ejectment.

The period for a suit to eject a non-occupancy raiyat is six months from the expiration of the term of the lease. Where the expiration of the term is indicated in the lease itself, the fact that an agricultural year ends at some later date will not extend the date of cause of action.

Appeal by the Defendant.

Suit for ejectment.

The suit was based on a lease, which was admitted by the defendant. This lease was for seven years, that is to say, from 1308 to the end of Baisakh 1315. The last day of Baisakh 1315 corresponded to 16th May, 1908. The present suit was instituted on the 7th December, 1908. The cause of action mentioned in the plaint was the month of Jeyt 1315. The plaintiff's case was that, after the expiry of the lease, he called upon the defendant to relinquish the lands covered by the lease. The first Court decreed the suit. On appeal by the defendant, the lower appellate Court dismissed the suit, holding it to be barred by limitation. The bar of limitation was not pleaded by the defendant, nor any issue was raised on the point by the first Court. The plaintiff appealed to the High Court.

Babus Joges Chandra Roy and Rajendra Chunder Guha for the Appellant.

Babu Lakshmi Narayan Singh for the Respondent.

The following judgement was delivered by

Sharfuddin J.—This is an appeal from the judgment and decree of the District Judge of Bhagalpore dated the 7th August 1909.

The plaintiff's suit was based on a lease, which is admitted

* Letters Patent Appeal No. 123 of 1911, against the decision of Mr. Justice Sharfuddin, dated the 15th August 1911 in Appeal from Appellate Decree No. 2861 of 1909, against the decree of M. K. Deb, Esq., Officiating District Judge of Bhagalpur, dated the 7th August, 1909, reversing that of Babu Shew Nandan Prasad, Officiating Munsiff, 1st Court of Bhagalpur, dated the 6th May, 1909.

CIVIL.

1911.

June, 6.

1911.

August, 15.

CIVIL.

1912.

Durbhjoy Mandal

v.
Daman Bhagat.

Sharfuddin, J.

by the defendant. This lease was for seven years, that is to say, from 1308 to the end of Baisakh 1315. The present suit was instituted on the 7th December 1908. It is, therefore, clear that the suit was instituted more than six months after the expiration of the lease in question.

In the Court of first instance, no issue was framed as to limitation nor was there any issue as to whether the date of the cause of action as mentioned in paragraph 5 of the plaint was correct or not. The plaintiff's case was that, after the expiry of the lease in question, he called upon the defendant to relinquish the lands covered by the lease and that the defendant, although he had agreed that he would relinquish possession of that land after the expiry of the term of the lease, did not do so and hence the suit.

The defendant, on the other hand, alleged that he had been in possession of the land from before the execution of the lease and that, therefore, he could not be dispossessed.

The first Court held against the defendant and gave a decree to the plaintiff holding that the defendant had not discharged the *onus* that was on him. On appeal to the District Judge by the defendant, it was held that the suit was barred by limitation evidently under clause (a) Article 3, Schedule III, Part I of the Bengal Tenancy Act. This clause provides that a non-occupancy raiyat may be ejected on the ground of the expiry of the lease within six-months of the expiration of the term and on this ground the appeal was decreed.

The plaintiff now appeals to this Court and the point urged by the learned *vakil* appearing for the plaintiff are *first* that the lower appellate Court has erred in law in dismissing the suit on a ground that was not raised in the written statement nor in the issues nor urged in argument before the first Court; *secondly*, that the defendant's case being that he was an occupancy raiyat and not a non-occupancy raiyat, the lower appellate Court has erred in law in holding that the suit was barred by limitation; and, *thirdly*, that the lower appellate Court ought to have first determined the status of the defendant before applying the six months' limitation to the present case.

The cause of section mentioned in the plaint is the month of Jeth 1315 F. S. This certainly appears to be incorrect as the *kabuliāt* distinctly shows that the lease was to expire on the last day of Baisakh 1315 which would be 16th May 1908; but it has been contended on behalf of the appellant that it

has not been traversed by the defendant anywhere in his written statement and that it is possible that although the *kabuliat* shows that the term would expire in the month of Baisakh, there may have been a custom in that part of the country of an extension of a month. That may or may not be ; but there can be no doubt that there was no issue framed on the point of limitation or cause of action : one depends on the other ; for, if the cause of action arose as mentioned in the plaint the suit would not be within time if the defendant is a non-occupancy raiyat. The whole thing, therefore, depends on the status of the defendant as to whether he is an occupancy raiyat or a non-occupancy raiyat. If he is the latter, the suit would certainly be barred if the cause of action arose on the 16th May 1908.

CIVIL.

1918.

DarbiJoy Mandal

Daman Bhagat.

Sharfuddin, J.

The grievance of the appellant is that if the defendant had traversed the plaintiff's allegation as to the date of the cause of action, he would have been in a position to prove circumstances that may have transferred the date of the expiry of the lease from the month of Baisakh to the month of Jait and that further, if an issue as to limitation had been raised, he would then have been in a position to show that the land was either *nij jote* or *khamar*. In that case, six months' limitation would not apply under section 116 of the Bengal Tenancy Act.

On behalf of the respondent, it is urged that the plaintiff's case is based on a *kabuliat* and that the plaint makes out the defendant as a non-occupancy raiyat and hence limitation would apply. That may be ; but there is nothing to show as to whether the 8 bighas of *nugdi jote* that was settled with the defendants under the *kabuliat* is or is not *khamar* or *nij jote*.

I, therefore, think that the most important point for determination in the present case was the status of the defendant with regard to the lands covered by the *kabuliat*. That being my opinion, I set aside the judgment of the lower appellate Court and remand the case to that Court for the purpose of determining the status of the defendant with regard to the land in question.

Costs will abide the result.

Against this decision, the defendant preferred an appeal under section 15 of the Letters Patent.

Babu Lakshmi Narayan Singh for the Appellant.

Babus Joges Chunder Roy and *Rajendra Chunder Guha* for the Respondent.

The judgment of the Court was delivered by

CIVIL.

1918.

Darbijoy Maudar

v.

Daman Bhagat.

June, 8.

Jenkins C. J.—In our opinion the judgment of Mr. Justice Sharfuddin cannot stand. The District Judge on appeal from the decree of the Munsiff held that the suit was barred by limitation. He so held, because in his view it was a suit to eject a non-occupancy raiyat on the ground of the expiration of the term of his lease. The period of limitation for such a suit is six months from the expiration of the term. The expiration of the term in this case is clearly indicated in the lease itself, and the date is the 30th of Baisakh 1315. The suit was not instituted until the 7th of December 1908, that is more than six months after the expiration of the term. Mr. Justice Sharfuddin has sent back the case in order that it may be determined whether the term which expires, according to the words of the lease, at the end of Baisakh is not extended to the end of Jaith by some custom of the country. There is no suggestion anywhere in the whole course of this litigation of any such custom; but it has been pressed upon us that the agricultural year in some parts of Behar is regarded as terminating in the end of Jaith. There is nothing on the record to show that: but even if this were so, it does not, in my opinion, lend any assistance to the plaintiff's case. All that would show would possibly be that there is a custom to the effect that notwithstanding the expiration of the term, as a matter of grace,—founded perhaps on agricultural exigencies, the land may be occupied for this further month. But notwithstanding that, the term would still expire at the time mentioned in the lease, so that it appears that it is profitless to send down the case for the purpose suggested. Therefore it is that I think the judgment of Mr. Justice Sharfuddin should be reversed, and the decree of the lower appellate Court confirmed. The appellant must receive his costs of both appeals in the High Court.

A. T. M.

Appeal allowed.

Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and
Sir Asutosh Mookerjee, Knight, Judge.

BISHAMBHAR SATBHAYA AND ANOTHER

v.

NADIAR CHAND MANDAL SATBHAYA AND OTHERS.*

*Declaratory suit, maintainability of—Suit for recovery of possession, bar of—
Limitation Act (IX of 1908), Sec. 28, Sch. I, Art. 142—Dispossession,
allegation of—Burden of proof.*

When there is a bar to the suit for recovery of possession, there is an extinguishment of title and no declaration of title can be made in plaintiff's favour.

When the plaintiff alleges dispossession, he must show that he has brought his suit within 12 years from this dispossession. When he fails to do that, his case falls within section 28 of the Limitation Act.

Appeal by the Defendants.

Suit for recovery of *khas* possession of some jungle land on declaration of plaintiff's *makarari* title to the same.

The plaintiffs alleged in their plaint that they were dispossessed in consequence of an adverse order under section 145 of the Code of Criminal Procedure. The defendants pleaded that they were co-sharers of the plaintiffs and had possession as such co-sharers, as also limitation. The first Court dismissed the suit holding that the defendants had made out their title as co-sharers and had been in possession as such co-sharers for over 12 years. The first appellate Court modified that decree by a declaration of title in favour of the plaintiffs.

The appeal came on for hearing before Mr. Justice D. Chatterjee, who delivered the following judgment :

D. Chatterjee J.—The plaintiffs brought this suit for recovery of *khas* possession of some jungle lands on a declaration of their *makarari* title to the same on the allegation that they had been dispossessed in consequence of an adverse order in a proceeding under section 145 of the Criminal Procedure Code in 1906. The defendants pleaded that they were co-sharers of the plaintiffs and had possession as such co-sharers to the extent of a 4 annas share ; they also pleaded limitation. The first Court dismissed the suit with costs holding that the defendants had

* Letters Patent Appeal No. 86 of 1912, against the decision of Mr. Justice D. Chatterjee, dated the 20th February, 1912 in Appeal from Appellate Decree No. 2421 of 1909, against the decree of Babu Gopal Chunder Bose, Subordinate Judge of Bankura, dated the 14th August, 1909, modifying that of Babu Girindra Nath Mukherjee, Munsiff 3rd Court of Bankura, dated the 24th July, 1908.

CIVIL :

1912.

June, 10.

1912.

February, 20.

Orvil.

1912.

Bishambhar

v.

Nadhar Chand.

D. Chatterjee, J.

made out their title as co-sharers and had been in possession as such co-sharers for over 12 years.

The learned Subordinate Judge on appeal has modified the decree of the first Court by a declaration of title in favour of the plaintiffs: he finds (1) that the plaintiffs alone are the *makararidars* of the mouza and the defendants are not co-sharers, (2) that the defendants received these lands from the ancestor of the plaintiffs but there is no reliable evidence as to whether they received them absolutely or as sub-tenants (3); that the defendants had been in exclusive possession for over 12 years; (4) that the possession of the defendants was not adverse but either permissive or as sub-tenants.

The defendants appeal and contend that as the suit was for recovery of possession on the allegation of dispossession the suit is barred under Article 142 of the Limitation Act, Schedule II and should have been dismissed and the plaintiffs have a cross-appeal that on the findings the suit should have been decreed in full.

It is true that the suit was for recovery of possession after dispossession and so far as it was such a suit it has been rightly dismissed under Article 142 of the second schedule to the Limitation Act. It was however also a suit for declaration of title to immovable property and as the alleged title of the defendants as co-sharers was for the first time set up in the litigation of 1906, the suit for such a declaration was quite within time, the suit having been brought in 1907. The decree declaring the title of the plaintiffs therefore as *makararidars* of the whole mouza cannot be impeached.

As the title of the plaintiffs has been found, the defendants would have been liable to ejectment if they could not make out a valid derivative title but the plaintiffs failed to prove possession within 12 years and the prayer for ejectment has been rightly dismissed. I cannot accede to the further argument of the appellant that their possession was exclusive, and, therefore, adverse. The reason is they did not plead adverse possession but possession as co-sharers. They disclosed the root of their title as being their position as co-sharers and they cannot be allowed to ascribe a different aspect to their possession. If they had pleaded adverse possession as an independent source of title other considerations might arise but they did not do so and cannot invoke the plea. See *Rajah Birendra Kishore Manikya Bahadur v. Akram Ali* (1).

In this view of the case the appeal and cross appeal are both dismissed, each party to bear its own costs in this Court.

Against this judgment, the defendants preferred an appeal under section 15 of the Letters Patent.

Babus Dwarka Nath Chuckerbutty and Tarak Chunder Chuckerbutty for the Appellants.

Babus Sibaprosunno Bhattacharya and Probodh Chunder Das for the Respondents.

The judgment of the Court was delivered by

Jenkins C. J.—The plaintiffs sue for possession, and on the face of their plaint show that they are out of possession and have been so for sometime. It is the defendant's case that they have been in exclusive possession for more than twelve years. The plaintiffs allege dispossession, and so they must show that they have brought their suit within twelve years from this dispossession. They have not done that and so the case falls within section 28 of the Limitation Act which provides that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." As there is a bar to the suit for the recovery of possession, so there is an extinguishment of the title, and it appears to us to have been erroneous to make any declaration in the plaintiffs' favour. We must, therefore, reverse the judgment of Mr. Justice Chatterjee and the decree of the Subordinate Judge and restore the decree of the Munsiff; and, the defendants must get the costs of the suit and the appeals throughout.

A. T. M.

Appeal allowed : suit dismissed.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice,
and Sir Asutosh Mookerjee, Knight, Judge.*

DEB NARAYAN DUTT

v.

CHUNI LAL GHOSE AND OTHERS.*

Novation—Contract Act (IX of 1872), Sec. 62—Acknowledgment of obligation by third person in favour of plaintiff.

Where a sum is payable by A. B. for the benefit of C. D., C. D. can claim under the contract as if it had been made with himself.

* Letters Patent Appeal No. 68 of 1911, against the decree of Mr. Justice Coxe, dated the 10th March, 1911, in Appeal from Appellate Decree No. 1778 of 1909, against the decree of B. B. H. Panton, Esq., Additional District Judge of 24-Parganas, dated the 26th April 1909, affirming that of Babu Asutosh Ghose, Additional Munsiff of Baruipur, dated the 18th December, 1906.

CIVIL.

1918.

Bishambhar

Nadlar Chand.

D. Chatterjee, J.

June, 10.

CIVIL.

1918.

June, 16.

CIVIL.

1918.

Deb Narayan

Chuni Lal,

Gregory and Parker v. Williams (1) followed.*Toeddie v. Atkinson* (2) not followed.

On the 22nd July, 1899, defendants Nos. 1 to 4 borrowed from the plaintiff a certain sum and by way of security, for this, they gave a personal covenant by a registered bond and also purported, though ineffectually, to create a charge, by deposit of a *pottis* relating to immovable property. Interest was paid on this bond upto the 18th April, 1903; and, on the 18th August, 1903, defendants Nos. 1 to 4 executed a registered instrument of transfer of all their property, movable and immovable, to defendant No. 5. There was a provision and a declaration in the *deeds* that out of the consideration money amongst other things, amount due to the plaintiff should be paid by defendant No. 5. On the very same day, there was an arrangement between the plaintiff and defendant No. 5 by which the liability of defendant No. 5 under the transfer was acknowledged and accepted, and either then or in connection therewith the *pottis* was handed over to defendant No. 5:

Held, that there was no novation within the meaning of section 62 of the Indian Contract Act.

That as the amount due to the plaintiff was allocated and held by defendant No. 5 for the benefit of the plaintiff, the latter was entitled to enforce his claim.

Appeal by the Plaintiff.

Suit for enforcement of a bond.

The Courts below dismissed the suit, holding that as there was a novation within the meaning of section 62 of the Indian Contract Act, defendants Nos. 1 to 4 were not liable and that the suit against defendant No. 5 was barred by limitation.

The plaintiff appealed. The appeal came to be heard by Mr. Justice Coxe on the 7th and 10th March 1911.

Babus Manmatha Nath Roy and *Krishna Prosad Sarbadhikari* for the Appellant.

Moukai Syed Shamsul Huda and *Nuruddin Ahmed* for the Respondents.

The following judgment was delivered by

Coxe J.—Defendants Nos. 1 to 4 in this case executed a simple bond in favour of the plaintiff in July 1899. They appear to have deposited with him a *pottis* which seems to have been a title deed covering some of these properties. In August 1903 these defendants conveyed their land to defendant No. 5 and it was then arranged between all the defendants and the plaintiff that defendant No. 5 should pay off the plaintiff out of the purchase money and that the plaintiff should accept defendant No. 5 as his debtor in the place of the first four defendants. The conveyance was registered.

(1) (1817) 3 Mer. 582.

(2) (1861) 1 B. & S. 898.

1911.

March, 10.

The plaintiff has now brought this suit against all the defendants on the original bond and recited in the plaint the circumstances under which he is entitled to hold defendant No. 5 responsible.

The suit has been dismissed by both the Courts below on the ground of limitation. It has been held that defendants Nos. 1 to 4 have no longer any liability to the plaintiff after the arrangement of August 1903 and as regards defendant No. 5 that he is liable only under an oral contract and that consequently the suit is barred by limitation.

The plaintiff appeals to this Court and on his behalf it has been argued that the suit under Article 116 of the Limitation Schedule could be brought within 6 years of the registered contract of August 1903. That registered contract was executed by defendants Nos. 1 to 4 in favour of defendant No. 5 and by it they sold their land to him for Rs. 2,000 and authorised him to pay off the plaintiff and recover from him the *potta* in deposit with him. The plaintiff was no party to that contract. It has been argued that although the plaintiff was not formally a party to that contract he was virtually a party and was intended to be benefited by that contract. And it is contended on the authority of the case *Husaini Begam v. Khwaja Muhammad Khan* (1) and on the decision of the Privy Council in appeal from the same case *Khwaja Muhammad Khan v. Husaini Begam* (2), that the plaintiff is entitled to sue on that contract. The case cited seems to me, to be of a very different character from that before me. The contract in that case was executed in favour of the father of the plaintiff and was to the effect that if the plaintiff's father give her in marriage to the defendant's son, the defendant would pay her Rs. 500 a month. The father of the plaintiff who was a party to the contract took no benefit or advantage whatever. The whole benefit of the contract was intended exclusively for the plaintiff and it may perhaps be added that the plaintiff performed her share of what had been stipulated. I do not think that it can be supposed that the Privy Council meant to lay down in that case that any body who receives any benefit under a contract between strangers can sue on that contract. Here, so far as the registered contract is concerned the people who were intended by the defendants Nos. 1 to 4 to be benefited were themselves.

(1) (1908) I. L. B. 29 ALL 151.

(2) (1910) I. L. B. 82 ALL 410; 14 O. W. N. 865.

CIVIL.
1918.
Deb Narayan
r.
Ohuni Lal.
Cora, J.

CIVIL.

1918.

Deb Narayan

v.
Ohuni Lal.

Case, J.

The plaintiff was entitled to the payment of this bond whether from them or from defendant No. 5. What they wanted was that they should be relieved from their liability to the plaintiff. It was for that purpose that they sold their land and not that the plaintiff might recover his dues. The case which I have cited must I think be regarded as exceptional, while there is nothing in the present case I think which justifies any departure from the ordinary rule that a person suing for compensation for breach of a contract must be a party to that contract. It appears to me, therefore, that the plaintiff is not entitled to sue on the registered conveyance and is therefore not entitled to the benefit of Article 116 of the Schedule to the Limitation Act.

It has also been argued by the learned vakil for the respondent that he would not in any case be entitled to the benefit of that article inasmuch as the contract was not signed by both the parties. He has shewn to me authority in Bombay and Madras in support of his contention. But with all respect to that authority I am bound by the decision of this Court in the case of *Girish Chandra Das v. Kunja Behari Malo* (1).

The second point taken is that the case comes under section 10 of the Limitation Act, inasmuch as by the contract the sale proceeds of the property were entrusted to defendant No. 5 to hold in trust for the benefit of the plaintiff and it is argued that defendant No. 5 is a trustee for the plaintiff and that no question of limitation can arise. But it does not appear to me that defendant No. 5 can be regarded as a trustee for the plaintiff, for as I have said the intention of defendants Nos. 1 to 4 was to benefit themselves—to relieve themselves of the liability to pay this debt and not to benefit the plaintiff. The case is quite different from that of *Anund Moya Dabi v. Grish Chunder Myty* (2) which was a case where a testator had directed his executor to pay his creditors. A direction of that kind was, no doubt, intended by the testator solely for the benefit of the creditors and was not intended to benefit himself in any way. Whereas here the direction to defendant No. 5 to pay the plaintiff was intended by defendants Nos. 1 to 4 entirely for their own benefit. Even in the case which I have cited it was held that in a case where the executors were directed to pay debts out of the property left by the testator limitation would run. I think it would be impossible to hold that whenever a person gives money to another with a direction

(1) (1908) I. L. B. 35 Calo. 683. (2) (1881) I. L. B. 7 Calo. 772.

to pay it to a third, the second is a trustee for the third to such an extent that the third can sue him for the money without any question of limitation ever arising.

Thirdly, it is argued that the facts found do not justify the decision that the proper period of the limitation to be applied is that prescribed by Article 116. Articles 83 and 103 have been referred to. Article 83 refers to contract to indemnify clearly. Here there is no contract of that nature. Defendant No. 5 did not agree to indemnify the plaintiff against the default of defendants No. 1 to 4. The liability of defendants No. 1 to 4 came to a complete end and there was a new contract by defendant No. 5. Nor does Article 103 apply either. And even if it did, the plaintiff would not, in my opinion, be benefited. The contract was, according to the plaint, that defendant No. 5 would soon pay the amount due on account of the bond. This agreement was come to in 1903, and the suit was instituted on the 25th January 1908. It lay upon the plaintiff to shew that his cause of action arose within 3 years from that date, and clearly in the circumstances his cause of action must have arisen for more than three years before the institution of the suit.

The fourth ground taken is that defendant No. 5 can be sued on the original bond as representative of defendants No. 1 to 4 and with this may be taken the 5th ground that the plaintiff is, at any-rate, entitled to a decree against defendants No. 1 to 4. Both these grounds appear to me to be concluded by the finding of the Courts below that the liability of defendants Nos. 1 to 4 had come to a complete end and that of defendant No. 5 had been substituted for it. It is argued that the Courts below have not found in express terms that the plaintiff accepted the 5th defendant as his debtor instead of defendants Nos. 1 to 4. It appears to me that that is the only possible meaning that can be attached to the decisions of the Courts below. The first Court uses the word "novation" and refers at length to section 62 of the Contract Act and its first illustration, holding at the end "As regards the liability of the defendants Nos. 1 to 4 the plaintiff having accepted the defendant No. 5 as his debtor their liability has terminated under section 62 of the Contract Act." The learned District Judge in appeal says "plaintiff has elected to enter into a fresh contract with defendant No. 5." It would have been impossible for the Courts below to come to this conclusion if they were not satisfied that the parties intended that the liability of defendants No. 1 to 4 should come to an

ORIGIN.

1918.

Deb Narayan

v.
Chuni Lal,

Omce, J.

CIVIL

1913.

Deb Narayan

v.

Ohuni Lal.

Coxe, J.

end. The express reference to section 62 of the Contract Act and the illustration under it shows that the Munsiff considered that the first contract had been completely superseded by the second and that the plaintiff had agreed to accept defendant No. 5 as his debtor in the place of defendants Nos. 1 to 4. On these findings the plaintiff is entitled to no decree against defendants Nos. 1 to 4 nor even defendant No. 5 be regarded in any way as the representative in interest of defendants Nos. 1 to 4 so as to enable the plaintiff to sue him on the original bond.

These are all the points taken and it appears to me that they all fail. The appeal must be dismissed with costs.

Against this decision the plaintiff preferred an appeal under section 15 of the Letters Patent.

Babus Mohendra Nath Roy, Krishna Prasad Sarbadhikari and Monmotho Nath Roy for the Appellant.

Babu Harendra Narayan Mitter and Moulvi Nuruddin Ahmed for the Respondents.

The judgment of the Court was delivered by

June, 16,

Jenkins C. J.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Coxe who has confirmed the decree of the lower appellate Court which in its turn confirmed that of the Court of first instance dismissing the suit with costs.

The facts are briefly these: On the 22nd of July 1899, defendant Nos. 1 to 4 borrowed from the plaintiff a sum of Rs. 300 and by way of security, for this, they gave a personal covenant by a registered bond and also purported, though ineffectually, to create a charge, by deposit of a *pottah* relating to immovable property. Interest was paid on this bond up to the 13th of April 1903; and, on the 18th August 1903, defendants Nos. 1 to 4 executed a registered instrument of transfer of all their property, movable and immovable, to defendant No. 5 for a sum of Rs. 2,000 becoming thereby, as the plaint describes it "rightless." This Rs. 2,000 was not all paid in cash, but there was a provision and a declaration in the *kobala* that out of this consideration money of Rs. 2,000, amongst other things, the sum of Rs. 330 due to the plaintiff should be paid by defendant No. 5. On the very same day there was an arrangement between the plaintiff and defendant No. 5 by which the liability of defendant No. 5 under the transfer was acknowledged and accepted, and either then or in connection therewith this *pottah* was handed over to defendant No. 5. The plaintiff, having sought in vain

payment of this money which in common honesty is due from defendant No. 5, has now been compelled to bring this suit, whereby he prays against defendant Nos. 1 to 4 and also defendant No. 5 but principally against defendant No. 5 a decree for payment of Rs. 613-14 annas, which represents this principal sum of Rs. 300 and the interest that accrued on it. As I have already indicated he has failed in all Courts, and the only question now is whether he is to fail before us.

We are clearly of opinion that there was no *novation* within the meaning of section 62 of the Contract Act—no substitution of a new contract for an old contract—and the question to be decided is whether or not the plaintiff is entitled to sue on that registered instrument of the 18th of August 1903, whereby defendant No. 5 undertook to pay the plaintiff what was due to him from defendants Nos. 1 to 4. Looking at it broadly, there can be no doubt that an obligation was undertaken by defendant No. 5 and that it was for and intended to be for the benefit of the plaintiff. There are expressions in the judgments of the Courts which are suggestive of an oral contract between the plaintiff and defendant No. 5, but that, I think, was a misconception of the position. Indeed, the findings of the lower appellate Court do not justify the view that there was a contract, but there was, as I have already indicated, an acknowledgment on the part of defendant No. 5 communicated to the plaintiff, and accepted by him of an obligation on the part of defendant No. 5 towards the plaintiff, for the debt which was to be paid by defendant No. 5 under the provisions of the registered instrument of the 18th of August 1903. It is material in this connection to observe, *first* that defendants Nos. 1 to 4 parted with the whole of their property, movable and immovable, to defendant No. 5, *secondly* that on the same date there was this arrangement between the plaintiff and defendant No. 5 which clearly points to a communication to the plaintiff of the transaction; and *finally* that as a result of this the *pottah* which was regarded by the parties at that time, erroneously perhaps, as constituting a charge on the property was handed back by the plaintiff to defendant No. 5. It appears to me that one may fairly say that this sum of Rs. 330 mentioned in the registered instrument of August was allocated and held by defendant No. 5 for the benefit of the plaintiff, so that in a sense the money was reified and earmarked for this purpose. We have here then a position in which it would be, in accordance with the principles

CIVIL,

1918.

Deb-Narayan

v.

Ohuni Lal.

Jenkins, C.-J.

CIVIL

1918

Deb Narayan

v.

Chuni Lal

Jenkins, C. J.

of justice, equity and good conscience, the abiding rule in these Courts, that the plaintiff should be entitled to enforce this claim against defendant No. 5. If we were governed by *Tweddle v. Atkinson* (1) there might possibly be a difficulty in our way, but it has to be borne in mind that *Tweddle v. Atkinson* (1) was a decision on a Form of action peculiar to the common Law Courts in England and that the case was influenced by the rule that no action in *assumpsit* could be maintained upon a promise unless *consideration* moved from the party to whom it was made. Here we have a definition of *consideration* which is wider than the requirement of the English law (section 2, (d) of the Contract Act). And it has been laid down by Sir Barnes Peacock in a full Bench decision of this Court in relation to Courts in the Muffussil, *Rambux Chittlangoo's* case (2), that in those Courts the rights of parties are to be determined according to the general principles of equity and justice without any distinction as in England, between that partial justice which is administered in the Courts of law and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of Equity. The rules, he added, and, the fictions which have been in many cases adopted by the Common Law Courts in England for the purpose of obtaining jurisdiction in cases which would otherwise have been cognizable only by the Courts of Equity, are not necessary to be followed in this country where the aim is to do complete justice in one suit. More than that I feel that we now have ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle v. Atkinson* (1). That I take to be the result of the decision of the Privy Council in a recent case: *Khwaja Muhammad Khan v. Husani Begam* (3). In the report of that case in 14 Calcutta Weekly Notes there is an interlocutory remark of Lord Macnaghten which indicates the limits imposed on a Court of Common Law. He there says, "supposing she (that is the plaintiff) were an English woman, it is true she could not bring an action in the King's Bench Division, but could she not bring a suit in equity?" The answer of the learned Counsel was, Yes. It is possible that this distinction can be explained by the history of the action of *assumpsit* which was a development of the writ of trespass. In the old writ in *indebitatus assumpsit* it was

(1) (1861) 1 B. & S. 393.

(2) (1867) 7 W. B. 377.

(3) (1910, I, L, B. 33 All. 410.

alleged that the defendant "not regarding his said promise and undertaking but contriving and fraudulently intending craftily and subtilly to deceive and defraud" had not paid and so forth. The breach of contract was charged as deceit and it was only the person deceived who could sue. The bar then in the way of an action by the person not a direct party to the contract was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience. The case with which we are now dealing finds a close parallel in *Gregory and Parker v. Williams* (1), and also in the more recent cases of *Touche v. Metropolitan Railway Warehousing Company* (2) and *Gandy v. Gandy* (3). There is a valuable exposition of the law by Lord Hatherby in the first of these last two which was adopted by Lord Justice Cotton in the second. The Lord Chancellor said "The case comes within the authority that where a sum is payable by A. B. for the benefit of C. D., C. D. can claim under the contract as if it had been made with himself". That appears to me to be a principle which is of distinct use in the consideration of this case. It appears to me that we have therefore in the circumstances of this case a condition of affairs in which it would be right to hold that the plaintiff is entitled to enforce his claim in this suit. The claim is one under the registered instrument of the 18th of August 1903: and, in that view of the case it is unnecessary to consider whether the plaintiff is entitled to rely on the deposition as an acknowledgment for the purpose of faking this case out of the operation of the Statute of Limitation, for admittedly if this is a suit on the registered instrument of transfer it is within time.

We, therefore, reverse the judgment of Mr. Justice Coxe, as also the decrees of the lower appellate Court and of the Munsiff so far as relates to defendant No. 5 and pass a decree in the plaintiff's favour for the sum of Rs. 613-14 annas with costs throughout. This decree will be against defendant No. 5 alone. As against defendants Nos. 1 to 4 the decree of dismissal will stand but without costs in this Court. Having regard to the disingenuousness of the defence made by defendant No. 5, interest should run at six per cent per annum on the principal sum adjudged from the date of the suit to the date of the decree and thenceforth on the decretal amount until payment.

A. T. M.

Appeal allowed: suit decreed.

(1) (1817) 3 Mer. 582.

(2) (1871) L. R. 6 Ch. 677.

(3) (1885) 80 Ch. D. 67.

CIVIL,

1918.

Deb Narayan

v.

Ohuni Lal.

Jenkins, C. J.

Before Mr. Justice N. Chatterjee and Mr. Justice Walmsley.

SRI PROSHAD NARAIN SINGH AND ANOTHER

v.

MUSSAMMAT DULHIN GENDA KOER.*

Application for probate—Caveator—Locus standi—Order refusing caveator to oppose—Appeal, if lies.

No appeal lies against an order refusing a caveator to oppose an application for probate on the ground that he has no *locus standi*.

Khotiramoni Dasi v. Shyama Churn Kundu (1) followed.

Appeal by the objectors, Sri Proshad Narain Singh and another.

The applicant Mussammat Dulhin Genda Koer applied to the Court of the District Judge of Mozufferpur, for probate of a will alleged to have been executed by her deceased husband, Babu Kishun Kishore Narayan Singh. Several persons put in petitions of objections opposing the grant of probate on the ground that the will was not a genuine one. The learned District Judge thereupon took up the first issue raised in the case, *i.e.*, "Have the caveators any *locus standi*," and after considering the formal evidence of interest adduced by the caveators decided the issue in favour of some and against others. The aforesaid objectors being aggrieved by the said order of the learned District Judge preferred the present appeal to the High Court.

Mr. S. P. Sinha (with him *Babu Baldeo Narain Singh*) for the Respondents, raised a preliminary objection that no appeal lay in the case.

Babu Golap Chandra Sarkar for the Appellant, submitted that an appeal lay to the High Court against the order passed by the District Judge. The suit was decreed against the appellants. Referred to section 86 of the Probate and Administration Act. The section is general. There is no reason why should the operation of the section be curtailed. There is nothing in the Code of Civil Procedure as to who may apply. Nor has any rule been framed under the Code as regards the particular point. Under section 69 of the Probate Act citations are to be issued; and every one is entitled to come before the Court. He relied on the cases of *Sheikh Asim v. Chandra Nath Namdas* (2) and *Lakhi Narain Shaw v. Multan Chand* (3) (*N. Chatterjee J.*

* Appeal from Original Order No. 80 of 1909, against the order of D. H. Kingsford, Esq., District Judge of Mozufferpur, dated the 1st December, 1908.

(1) (1891) I. L. R. 21 Cal. 539

(2) (1904) 8 C. W. N. 748

(3) (1912) 17 O. L. J. 230.

pointed out that the case in 8 C. W. N. 748 arose out of an application for revocation of probate). He further submitted that unless relationship was established in probate proceedings it would be *res judicata* in a subsequent regular suit: see *Ram Nandan Pershad v. Sheoparsan Singh* (1).

Mr. S. P. Sinha for the Respondent, submitted that the cases of *Abhiram Dass v. Gopal Dass* (2), *Khettramoni Dasi v. Shyama Churn Kundu* (3), *Lalit Mohan Das v. Radharaman Saha* (4), supported his contention.

Babu Golap Chandra Sarkar, in reply.

The judgment of the Court was delivered by

N. Chatterjee J.—A preliminary objection has been taken to the hearing of this appeal on the ground that no appeal lies against the order refusing to allow the appellants to oppose the application for probate on the ground that they have no *locus standi*. The case of *Khettramoni Dasi v. Shyama Churn Kundu* (3) shows that there is no appeal in such a case. The appeal is, accordingly, dismissed with costs. We assess the hearing fee at two gold mohurs.

A. N. R. C.

Appeal dismissed.

(1) (1910) 11 C. L. J. 828.

(8) (1894) I L. R. 21 Calo. 539.

(2) (1893) I L. R. 17 Calo. 48 (51).

(4) (1911) 15 C. W. N. 1021.

*Before Sir Harry Lushington Stephen, Knight, Judge, and
Mr. Justice Mullick.*

NABIN CHANDRA TRIPATI

v.

KALI KUMAR DAS AND OTHERS.*

Civil Procedure Code (Act V of 1908), Secs 99, 107, cl. (1), sub-cl. (b), O. XLI, rr. 23 and 25—Remand—Appellate Court, powers of—Inherent power, if any—Error or irregularity not affecting merits—Decree, whether to be reversed.

A Court of appeal has the power to remand a case only under section 107 and Order XLI, Rules 23 and 25 of the Code of Civil Procedure, and has no inherent power to remand the same even when the original Court "has committed any error, omission or irregularity by reason of which there has not been a proper trial or an effectual or complete adjudication of the suit, and the party who complains of such error, omission or irregularity, has been thereby materially prejudiced."

* Appeal from Appellate Order No. 22 of 1912, against the order of Babu Rajani Kanta Chatterjee, Subordinate Judge, 1st Court, District Chittagong, dated the 30th of November, 1911, reversing the order of Babu Rash Behary Burman, Munsiff at Putiya, dated the 29th of August, 1910.

CIVIL,

1912.

Proshad Narayan

Dublin Genda.

May, 22.

CIVIL,

1912.

May, 26.

June, 9.

CIVIL.

1913.

Nabin Chandra
v.
Kali Kumar.

Fokra Bibi v. Zobeda Khatun (1) not followed.

Having regard to the provisions of section 99 of the Code of Civil Procedure, High Court treated an error of law made by the lower appellate Court in the present case as an irregularity, and inasmuch as the said error did not at all affect the merits of the case, it refused to interfere.

Appeal by the Plaintiff.

Suit for partition.

The material facts and arguments will appear sufficiently from the judgment.

Babu Kshitish Chandra Sen for the Appellant.

Babu Dharendra Lal Kastgir for the Respondent. C. A. V.

The judgment of the Court was as follows :

June, 9.

This is a partition suit in which the preliminary decree ordered partition with as little disturbance on allotment to the then possession as possible. The Commissioner proceeded to allot the land disturbing the possession of defendants Nos. 6 and 7, who were holding land less in amount than what they were entitled to, and without compensating them in land or otherwise for what he deprived them of and the Munsiff adopted this partition; on appeal the Subordinate Judge in allowing the appeal found that the direction contained in the preliminary decree had not been complied with, pointed out how the partition should have been effected, and remanded the suit directing a partition on the lines he indicated. On appeal to us against this order it is argued that the Subordinate Judge had no power to order this remand, since it is not on a preliminary point under Order XLI, Rule 23, and is not a reference of issues to the lower Court for trial under Order XLI, Rule 25. The respondent however contends that the Court had an inherent power to remand the suit, because such a power exists wherever in the words of this Court in *Fokra Bibi v. Zobeda Khatun* (1), the Court whose decision is appealed against "has committed any error omission or irregularity by reason of which there has not been a proper trial or an effectual or complete adjudication of the suit, and the party who complains of such error" and so on "has been thereby materially prejudiced." This is a proposition to which we are unable to agree. We see no reason apart from legislation for saying that a Court of appeal has a power of remand: and the substitution of the new for the old Code of Civil Procedure does not seem to us to support the conclusion which this Court drew from it in the case referred to. Order XLI,

(1) (1910) 12 O. L. J. 338.

Rules 23 and 25 of the new Code take the place of sections 562, 566 of the old one. Section 564 of the old Code enacted that "the appellate Court shall not remand a case for second decision except as provided in section 562" and this enactment is not repeated in the new Code. From this this Court drew the conclusion that an appellate Court has the inherent power that we have referred to. This argument seems to us to be inconsistent with the method of construction properly applicable to an Act divided into sections and Rules as the present Code is. This method we apprehend to be that the sections lay down general principles, and the Rules provide the means by which they can be applied, and they cannot be otherwise applied. The result is that the Rules restrict the provisions contained in the sections. Applying this construction to the present case we find that section 107 (1) (b) confers on any appellate Court a power "to remand a case," and then proceeds to limit this power by Order XLI, Rule 23, where the old Code gave a restricted power and then proceeded to enact that the Court had no other power for a similar purpose. This Code confers a general power in the widest possible terms and then restricts its application by an enactment of the former limitations. The methods of describing the powers of the Court differ : but the result is the same ; section 564 of the old Code was not re-enacted : but that is because the canon of construction that we have mentioned was recognised, and the enactment became unnecessary. The result follows that an enactment that the Court "shall have power to remand" takes the place of one that a Court "shall not remand" without the law being altered, which may be curious, but is not otherwise worthy of notice. If the canon of construction that we suggest is not correct, we are at a loss to understand why it was that the Court in *Zohra Bibi v. Zobeda Khatun* (1), did not seek for a power of remand in section 107 rather than invoke the inherent powers of the Court. If our canon is correct, the inherent powers attributed to the Court seem to be taken away if they ever existed by a direct legislative enactment. We therefore cannot agree with the decision we have mentioned. Though we may perhaps point out that we are dealing only with the question of the power of a Court to remand in an appeal from an original decree, and not with an appeal from an appellate decree which falls under Order XLII.

Under these circumstances we should feel ourselves bound

ORDER.

1913.

Nabin Chandra

Kali Kumar.

CIVIL

1913.

Nabin Chandra.
v.
Kali Kumar.

to refer the decision we have mentioned to a Full Bench, were it not that on the authority of *Mohesh Chandra Dass v. Jamiruddin Mollah* (1) it is open to us to treat what we consider to have been the mistake made by the Subordinate Judge as an irregularity under section 99 of the Code, and that under the circumstances of this case the merits of the case have not at all been affected by the order before us. We therefore dismiss the appeal; but we make no order as to costs.

A. N. R. C.

Appeal dismissed.

(1) (1901) I. L. R. 28 Calc. 321.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

AKHIL PRODHAN

v.

MANMATHA NATH KAR AND OTHERS.*

CIVIL

1913.

May, 15, 1908.

Fraud—Suit for declaration of title and possession—Fictitious suit, decree and sale—Agreement to execute release—Specific performance—Limitation—Fictitious conveyance—Fictitious decree, if defrauded—Relief—Civil Procedure Code (Act XIV of 1888), Sec. 317.

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected, when and when alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with.

Section 317 of the Code of Civil Procedure contemplates a real sale in execution of a real decree in a real suit. It is not applicable to the case of a fictitious sale held in execution of a fictitious decree obtained in a fictitious suit.

Bendon v. Becker (1) referred to.

In 1898, a tenant executed a fictitious conveyance of his land in favour of A with a view to protect himself from invasion of his rights by his landlord. In 1899, he, to protect himself from A, who proved unfaithful, induced his landlord to institute a fictitious suit for rent. That suit was decreed on the 7th November, 1899. The landlords took out execution of that decree. A thereupon preferred a claim which was disallowed on the 20th January, 1900. The decree was subsequently executed and at the sale which followed, the landlord purchased the holding on the 19th March, 1900 and possession was delivered on the 5th June, 1900. On the 10th April, 1900, A sued the tenant and the landlord for declaration of his title on the basis of his conveyance; but on the 23rd July, 1900, this suit was withdrawn. In 1903, the landlord turned against the tenant and with the help of the Police took away by force the crops raised by him. On the 16th March, 1907, the

* Appeal from Appellate Decree No. 2910 of 1909, against the decree of H. E. Forrester, Esq., District Judge of Midnapur, dated the 3rd September, 1909, reversing that of Babu Ambica Charan Mookerjee, Subordinate Judge of Midnapur, dated the 31st July, 1908.

(1) (1885) 3 Cl. & F. 479.

tenant commenced the present suit for declaration that the entire proceedings in the rent suit of 1899 were fictitious and that the landlords did not acquire any title on the basis of their purchase at the execution sale. The plaintiff also alleged that the landlords defendants agreed to execute a release and in the prayer clause of the plaint he asked for a decree for execution of such release by the landlords :

Held, that as the suit was in essence one for declaration of title to land and for confirmation of possession and not for specific performance of a contract, it was not barred by limitation ;

that as the conveyance in favour of A was a fictitious document, A had no real title to the property and was not defrauded ; and the plaintiff consequently was not disentitled to protection in a Court of equity ;

that section 817 of the Code of Civil Procedure was no bar to the maintainability of the suit.

Appeal by the Plaintiff.

Suit for declaration that the proceedings in a rent suit brought against the plaintiff by the first and second defendants were fictitious and had not affected his title to the land mentioned in the schedule to the plaint, and also for confirmation of possession of those lands.

The material facts are set forth above.

Babus Ram Chandra Mazumdar and Manmatha Nath Mukerjee for the Appellant.

Babus Dwarika Nath Chuckerbutty, Surendra Nath Das Gupta and Sasadhar Roy (for *Babu Surendra Nath Roy*) for the Respondents.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the plaintiff in a suit for declaration that the proceedings in a rent suit brought against him by the first and second defendants were fictitious and have not affected his title to the lands mentioned in the schedule to the plaint, and also for confirmation of possession of those lands. The circumstances under which the plaintiff seeks relief are not now in controversy. The subject-matter of litigation was held by the plaintiff under the Kar defendants as a tenant. In 1894, his landlord sued to eject him on the allegation that he was a trespasser. This suit was dismissed by the Court of first instance and that decree was ultimately affirmed, on appeal, by this Court on the 20th July 1897. In this litigation, the plaintiff was assisted by the Jana defendants. Accordingly in 1898 he executed fictitious conveyances in their favour with a view to protect himself from further aggression on the part of the Kars. In 1899, he found that the Janas were unfaithful,

CIVIL.

1918.

Akhil Pradhan

Manmatha Nath.

May, 18.

CIVIL.

1918.

Akhil Prodhan
&
Manmatra Nath.
Mooharjee, J.

and so to protect himself against the Janas, he induced his landlord to institute a fictitious suit for rent. That suit was decreed on the 7th November 1899. The Kars took out execution of this decree. The Janas thereupon preferred a claim which was disallowed on the 20th January 1900. The decree was subsequently executed and at the sale which followed, the Kars purchased the holding on the 19th March 1900. The plaintiff alleges that possession was formally delivered to the Kars on the 5th June 1900. As a matter of fact he himself has ever since continued in occupation of the land. On the 10th April 1900 the Janas sued the plaintiff and the Kars for declaration of their title on the basis of their conveyances; but on the 23rd July 1900 this suit was withdrawn. In 1906 the Kars turned against the plaintiff, and with the help of the Police took away by force the crops raised by him. On the 15th March 1907, the plaintiff commenced this suit for declaration that the entire proceedings in the rent suit of 1899 were fictitious and that the Kars did not acquire any title on the basis of their purchase at the execution sale. The Court of first instance found in favour of the plaintiff and made a decree in accordance with the prayer in the plaint. Upon appeal that decree has been set aside by the District Judge on the ground that as the plaintiff entered into this fraudulent arrangement with the Kars with a view to defraud the Janas he is not entitled to any relief in a Court of Equity. The District Judge has further found that the suit is in essence a suit for specific performance of a contract and is consequently barred by limitation. On the present appeal the decision of the District Judge has been assailed on two grounds; namely, *first*, that the suit is not barred by limitation, and, *secondly*, that the conduct of the plaintiff has not been such as to disentitle him to relief in a Court of Equity. These points have been controverted on behalf of the Kar defendants, who have further urged that the suit is barred under section 317 of the Code of Civil Procedure of 1882. In our opinion, the decree of the District Judge cannot be supported.

In so far as the first ground is concerned, no question of limitation arises in this case. The suit is not one for specific performance of a contract. No doubt the plaintiff alleged that the Kar defendants had agreed to execute a release and in the prayer clause of the plaint he asked for a decree for execution of such release by the Kars. But the suit is in essence one for

declaration of title to land and for confirmation of possession. The plaintiff seeks a declaration that the proceedings in the rent-suit were fictitious and did not operate to affect his title in any manner; he also prays for confirmation of possession. As the Kars turned against the plaintiff and took away the crops grown by him in November 1906, and the suit was commenced on the 15 h March 1907, it is amply in time. We hold accordingly that the suit is not barred by limitation.

In so far as the second ground is concerned, it is clear that the plaintiff is not disentitled to relief in a Court of Equity. It may be conceded that the fictitious suit for rent was instituted against him by the Kars at his instance with a view to make it impossible for the Janas to assert their claim under the conveyances. But the Janas cannot be said to have been defrauded unless it is established that they had a valid title. Upon this point, the Court of first instance found that the Janas who are said to have been defrauded paid no consideration for the conveyances in their favour; in other words, that the conveyances were fictitious documents which had been executed by the plaintiff with a view to protect himself from any invasion of his rights by the Kars. Under these circumstances, it is impossible to maintain the view that the Janas were defrauded. On behalf of the Kars, we have been pressed to remand the case for consideration of the question whether the Janas had any subsisting title; but we cannot accede to this request. It is plain from the grounds of appeal taken by the Kars before the District Judge that the findings of the Court of first instance upon this question were not specifically assailed, and it is clear that if the point had been argued before the District Judge, there would have been a discussion of the evidence on this point in the judgment. It appears to have been assumed before the District Judge that the Janas were defrauded, because the effect of the execution sale was to make it impossible for the Janas to assert their title. But it appears to have been overlooked that if they had no real title to the property, they could not be defrauded. The case thus falls within the principle of the decision of this Court in *Jodu Nath Poddar v. Rup Lal Poddar* (1) and of the Judicial Committee in *Puthierpermal Chetty v. Muniandy Servai* (2) namely, that to enable a fraudulent confederate to retain property transferred to him in order to

CIVIL.

1913.

Akhil Pradhan

v.
Manmathe Nath.

Mookerjee, J.

(1) (1906) L. L. B. 38 Calo. 967 (978); 4 O. L. J. 22.

(2) (1908) L. L. B. 35 Calo. 551; 7 C. L. J. 528.

CIVIL.

1912.

Akhil Prodhan
v.
Manmatha Nath.

Mookerjee, J.

effect a fraud, the contemplated fraud must be effected, when and when alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with. The plaintiff is consequently not disentitled to protection in a Court of Equity.

The only other point which requires consideration is whether the suit is barred under the provisions of section 317 of the Code of 1882. That section provides that no suit shall be maintained against a certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of a man through whom such other person claims. The case before us is not a suit of this description. Section 317 contemplates a real sale in execution of a real decree in a real suit. Here, we find a fictitious suit for rent in which there was no controversy between the parties. In that fictitious suit a fictitious decree was made and the sale held in execution of that decree was equally fictitious. To a suit of this description the observation of Lord Brougham in *Bandon v. Becher* (1), applies: "A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled. In order to make a sentence, there must be a real interest, a real argument, a real prosecution, a 'real defence, a real decision.' Of all these qualities, not one takes place in the case of a fraudulent and collusive suit; there is no Judge but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question." See *Radha Madhab v. Kulpataru* (2). To a suit of this description section 317 cannot possibly have any application.

The result is that this appeal is allowed, the decree of the District Judge set aside, and the suit decreed with costs in all the Courts in the manner following. The decree will declare that the suit for rent (No. 369 of 1899) instituted against the plaintiff by the Kar defendants in 1899 and all proceedings based thereon were fictitious and have not affected his title in any manner; his possession will further be confirmed, or, if he has meanwhile been dispossessed, he will be restored to possession in execution of this decree.

A. T. M.

Appeal allowed: suit decreed.

(1) (1835) 3 O.L. & F. 479.

(2) (1912) 17 C. L. J. 201 (212).

• *Before Sir Asutosh Mukherjee, Knight, Judge, and Mr. Justice Beachcroft.*

DASARATH PATEL AND ANOTHER

v.

BROJO MOHON GAONTIA AND OTHERS.*

CIVIL.

1918.

March, 19.
August, 16.

Lambardar—Lambardar, if can settle vacant land—Principal and agent—Authority conferred by two or more persons, if can be revoked by one—Contract Act (IX of 1872), Secs. 203, 204, 205—Revocation of agent's authority, when affects third person—Notice, nature of—Burden of proof—Civil Procedure Code (Act V of 1908) O. 41, R. 4—Parties to appeal.

A lambardar has no statutory but may have customary authority to make a settlement, with the tenants, of land vacated by the original tenant.

Where authority is conferred on an agent by two or more principals jointly, the authority may be revoked by one, and it is sufficient if notice of revocation is given by one of the principals. The revocation of the authority of an agent may take effect, in so far as third persons are concerned, at a point of time different from the moment when it takes effect with regard to the agent himself. As to the agent himself, the revocation takes effect from the time when it is made known to him, and, as to third persons, when it is made known to them and not before; and until revocation is so made known, it is inoperative. If known to the agent, as against his principal his rights are gone, but as to third persons who are ignorant of the revocation his acts bind both himself and his principal. Where one has been the agent constituted and accredited to carry on business for another, his authority to bind his principal continues after actual revocation as to those who have been accustomed to deal with him as such agent, until notice of the revocation of his agency is brought home to them. This rule is based on the principle that a person, who has accredited another as his agent, is estopped from denying that agency at a subsequent time, as against the persons to whom he has accredited him, by reason of any such revocation.

As regards third persons, express or actual notice is not necessary: it is sufficient to establish that the persons had knowledge that the authority of the agent had been revoked. The burden of proof is on the principal to establish that the third persons were aware of the revocation of the agent's authority.

The plaintiffs along with the first defendant and two other persons who were not parties to the litigation were *gaontias* of the village which comprised the disputed land. The first defendant was the lambardar. The land was originally in the occupation of a tenant who abandoned it. As soon as the tenant vacated the land, the plaintiffs served notice upon the first defendant in which they requested him either not to lease their share of the land to any tenant, or to lease the same to the plaintiffs themselves. Notwithstanding this notice, the first defendant settled the land with the remaining defendants. The plaintiffs consequently sought a declaration that the first defendant was not competent to grant a valid lease to the other defendants and that

* Appeal from Appellate Decree No. 1028 of 1911, against the decree of J. O. K. Peterson, Esq., District Judge of Manbhum, dated the 2nd March, 1911, reversing that of Babu Gagan Behary Chowdhry, Munsiff of Sambalpur, dated the 16th September, 1910.

CIVIL

1913.

Dasarath

Brojo Mohon.

they were entitled to joint possession of the land. The Court of first instance held in the first place that the lambardar defendant was not competent to grant a lease of the land to the other defendants; and in the second place, that if the lambardar had authority to grant such a lease, that authority had been validly terminated:

Held, that under the circumstances, it was open to the first defendant to prefer an appeal against the whole decree without joining the other defendants as respondents and to obtain thereupon a reversal of that decree in favour and for the benefit of all the defendants under Order XLII, Rule 4 of the Code of Civil Procedure; but it was obligatory upon the plaintiffs in second appeal to join as parties respondents not merely the first defendant but also the tenant defendants:

Held also, that the first defendant had no authority to settle the land and his authority had been revoked by the notice given to him.

Appeal by the Plaintiffs.

Suit for recovery of joint possession of land.

The material facts are set forth above.

Babus Ram Chunder Mosumdar and Chandra Sekhar Banerjee for the Appellants.

Babus Jadu Nath Kanjilal and Jogendra Kumar Dey for the Respondents.

The judgment of the Court was delivered by

August, 14

Mookerjee J.—This is an appeal by the plaintiffs in a suit for recovery of joint possession of land. The two plaintiffs along with the first defendant and two other persons who are not parties to this litigation are *gaontias* of the village which comprises the disputed land. The first defendant is the lambardar. The land was originally in the occupation of a tenant who abandoned it. As soon as the tenant vacated the land, the plaintiffs served notice upon the first defendant on the 30th September, 1908, in which they requested him either not to lease their share of the land, to any tenant, or to lease the same to the plaintiffs themselves. Notwithstanding this notice, the first defendant settled the land with the remaining defendants who are five in number. The plaintiffs consequently seek a declaration that the first defendant was not competent to grant a valid lease to the other defendants and that they are entitled to joint possession of the land. The Court of first instance decreed the suit. Against that decree an appeal was preferred by the first defendant alone and to that appeal the plaintiffs, but not the tenants defendants, were made respondents. The appeal was heard and allowed. The District Judge directed that the suit be dismissed and that the decree of the Court of first instance be set aside. It is plain that the District

Judge intended to set aside the entire decree, although the appeal had been preferred by the first defendant alone and the other defendants had not been joined as parties respondents. The plaintiffs have now appealed to this Court. In the memorandum as originally presented, the first defendant alone was named as respondent. The appeal was heard on the 12th March last, and objection was taken by the first defendant that the tenant defendants should also be joined as respondents. The Court thereupon made an order under Order 41, Rule 20 of the Code of 1908. Notices have been served upon the added respondents and they have entered appearance.

In support of the appeal, it has been contended that the first defendant as the lambardar had no authority to grant leases of the land abandoned by the original tenant to the tenants defendants, that if he had such authority that authority had been validly revoked by the notice served upon him and that consequently the tenant defendants have not acquired any title to continue in occupation of the share of the land which belongs to the plaintiffs. On behalf of the lambardar respondent, it has been contended that as lambardar he had ample authority to let out the land to such tenants as he might choose; that his authority has not been revoked and that it could not be revoked at the instance of two out of five *gaontias* whom he represents as lambardar. On behalf of the tenants respondents, it has been contended that in so far as they were concerned, there was no valid revocation of the authority of the lambardar, because they had no notice of the alleged revocation, and that consequently they are not affected by the notice served by the plaintiffs upon the first defendant.

CIVIL

1912.

Dasmath

Brojo Mohon.

Mookerjee, J.

Before we deal with the questions raised it is necessary to point out that it was open to the District Judge to reverse the entire decree of the Court of first instance upon appeal preferred by the first defendant alone. Rule 4 of Order 41 of the Code, in so far as it is applicable to the case before us, provides that where there is more defendant than one in a suit and the decree appealed from proceeds on any ground common to all the defendants, any one of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the defendants. In the case before us, there is more defendant than one in the suit. The decree of the Court of first instance proceeds on a ground common to all the defendants. The Court of first instance held

CIVIL

1918.

Dasarath

v.

Brojo Mohon.

Mookerjee, J.

in the first place that the lambardar defendant was not competent to grant a lease of the land to the other defendants : and in the second place, that if the lambardar had authority to grant such a lease, that authority had been validly terminated. These were grounds which affected all the defendants in an equal degree. It was consequently open to the first defendant to prefer an appeal against the whole decree and to obtain thereupon a reversal of that decree in favour and for the benefit of all the defendants. This course was open to the Court below, notwithstanding the fact that the other defendants had not been joined as parties respondents to the appeal. Consequently it cannot be urged successfully, as is sought to be done on behalf of the appellants, that the District Judge was not competent to reverse the entire decree of the Court of first instance. In any event as that decree has been actually reversed in its entirety, this Court could not be invited to set aside the appellate decree in so far as it was in favour of the tenant defendants without their presence before this Court. Consequently, it was obligatory upon the appellants to join as parties respondents to this appeal not merely the first defendant but also the tenants defendants.

The first question for consideration in the appeal relates to the position of the first defendant as lambardar. It has been argued that as lambardar he had no statutory authority to grant a lease of the land abandoned by the original tenant. In section 4 clause (11) of the Central Provinces Land Revenue Act, 1881, the term 'lambardar' is defined to mean a person appointed in the manner prescribed by the Act to represent the proprietary body of a mehal in its relations with the Government. Section 138 defines the duties of a lambardar. These duties are three-fold ; namely, *first*, to collect and to pay into the Government treasury so much of the land revenue as may, under section 71, be payable through the lambardar, either solely or jointly with other lambardars or sub-lambardars ; *secondly*, to collect and pay to the Mukuddam or into the Government treasury, all sums of money payable through him, either solely or jointly with other lambardars or sub-lambardars, by the proprietor whom he represents on account of the remuneration of the Mukuddams or village watchmen or on account of any expenses which the Mukuddam is authorised to recover from the lambardar or sub-lambardar in the village ; and, *thirdly*, to assist the Mukuddam in obtaining all particulars which he is bound to enter in the

annual village papers or to report under the Act. Section 71, to which reference is made, authorises the Settlement Officer to determine to which of the lambardar or sub-lambardars the amount of revenue payable by each proprietor shall be paid. Section 137 defines the mode of appointment of the lambardar. It is consequently plain that the lambardar has no statutory authority to make a settlement, with the tenants, of land vacated by the original tenant. But although the lambardar does not possess a statutory authority, the question may arise whether he has customary authority to do so. In the case before us no such customary authority has been alleged or proved nor has the case been brought within section 70 which authorises the Settlement Officer to ascertain the customs or rules by which the proprietors in each Mehal are mutually bound as to the granting of *pottaks*, ejectment of tenants and realization and distribution of rents and other profits, the payment of land revenue, village expenses and other charges and generally as to the control and management of the Mehal. There is no suggestion that the Settlement Officer has ever ascertained the existence of a custom by the lambardar as to the settlement of vacated land nor has he decided any dispute relating to the matters mentioned in section 70. The decisions in *Daryao Singh v. Mukund Singh* (1), *Babu v. Faillal* (2), *Gopal v. Govind* (3), *Protap v. Umrao* (4) and *Nilmani v. Jogendra* (5), to which reference has been made, do not show that the lambardar as such has authority to settle vacant lands at his own discretion. The position, therefore, is that the first defendant is not shown to possess either statutory or customary authority to settle the disputed land. But the facts stated in the plaint seem to indicate that he had implied authority to make such settlement. In the first place, the plaintiffs allege that on a previous occasion the first defendant as lambardar had, apparently with the concurrence of the *gaontias*, made settlement of lands in the village. In the second place, the very terms of the notice served by the plaintiffs upon the first defendant, indicate that the first defendant would, but for such notice, settle the land with tenants. We must consequently proceed on the assumption that the first defendant had implied authority from his co-sharers to settle the disputed land with tenants.

The second question for consideration is, whether this implied authority of the first defendant has been validly revoked.

CIVIL

1918.

Dasarath

v.

Brojo Mohon.

Meekerjee, J.

(1) (1888) 2 O. P. L. R. 108.

(3) (1900) 18 O. P. L. R. 118.

(4) (1898) 7 O. P. L. R. 187.

(5) (1896) 11 O. P. L. R. 1.

(6) (1904) L. L. R. 37 Calo 684; 12 O. L. J. 104.

Divin.

1913.

Dasarath

Brojo Mohon.

Meekerjee, J.

It has been argued on his behalf that such authority could not be revoked; not, at any rate by two out of the entire body of persons whom he represents. In our opinion, there is no foundation for this contention. It is well settled that where authority is conferred on an agent by two or more principals jointly, the authority may be revoked by one, and it is sufficient if the notice of revocation is given by one of the principals. Reference may in this connection be made to the case of *Bristowe v. Taylor* (1), where Lord Ellenborough, C. J. observed that the authority to the agent was countermandable and that each partner had a right to countermand before any act intervened which in point of law would preclude the revocation. Subsequently, an application was made to set aside this decision but was refused: *Porter v. Taylor* (2). The terms of section 203 of the Indian Contract Act do not militate against this view. That section provides that the principal may revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal. This is followed by section 204 which lays down that the principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the course of the agency. There is no reason to suppose that the Indian Legislature intended to depart from what is the well settled law in England on the subject. We are clearly of opinion that the authority of the first defendant was revoked by the notice given to him.

The third question for consideration is, from what point of time did this revocation take effect. Section 208 of the Indian Contract Act provides that the termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, and so far as regards third persons, before it becomes known to them. Consequently, in the view taken by the legislature, the revocation of the authority of an agent may take effect, in so far as third persons are concerned, at a point of time different from the moment when it takes effect with regard to the agent himself. This in fact is well settled in England, and in Story on Agency, section 470, it is stated that as to the agent himself, the revocation takes effect from the time when it is made known to him, and as to third persons, when it is made known to them and not before; and until revocation is so made known, it is inoperative. If known to the agent, as

(1) (1816) 2 Starkie, 60. (2) (1817) 6 M. & S. 156; 18 B. R. 388; 19 B. R. 275.

CIVIL.

1918.

Damarath

Brojo Mahon.

Mookerjee, J.

against his principal his rights are gone, but as to third persons who are ignorant of the revocation his acts bind both himself and his principal. Where one has been the agent constituted and accredited to carry on business for another, his authority to bind his principal continues after the actual revocation as to those who have been accustomed to deal with him as such agent, until notice of the revocation of his agency is brought home to them. The principle whereon this rule is based, is explained by Lord Selborne in *Scarf v. Fardine* (1) to be that a person, who has accredited another as his agent, is estopped from denying that agency at a subsequent time, as against the persons to whom he has accredited him, by reason of any secret revocation: *Pole v. Leask* (2), *National Bolivian Navigation Co. v. Wilson* (3). In the case before us, consequently, the question arises, whether the tenant defendants had notice of the revocation of the authority of the first defendant. As pointed out in *Staveland v. Uzili* (4) express or actual notice is not necessary; it is sufficient to establish that the person had knowledge that the authority of the agent had been revoked. The case has not been examined from this point of view, and must be further investigated.

The result is that this appeal is allowed the decrees of the Courts below set aside and the case remanded to the Court of first instance in order that the Court may determine, upon fresh evidence to be adduced by both parties, whether the tenants defendants were aware at the time when they took the leases from the first defendant that the authority of the latter had been revoked by the plaintiffs. The burden of proof will be upon the plaintiffs to establish that the defendants were so aware. If that burden is discharged, the plaintiffs will be entitled to a decree for joint possession. If the plaintiffs fail to prove that the defendants were aware that the authority of the first defendant had been revoked, the suit will stand dismissed.

The tenant respondents are entitled to the costs of this appeal from the plaintiffs appellants. The plaintiffs appellants are entitled to their costs of this Court as also of the Court of appeal below from the first defendant. But they must pay the first defendant the costs of the previous hearing in this Court which proved infructuous, because the necessary parties had not been joined in the appeal. The costs of the Court of first instance will abide the result of the re-trial.

A. T. M.

Appeal allowed: case remanded.

(1) (1882) 7 A. C. 845 (849).

(3) (1880) 5 A. C. 178 (209).

(2) (1860) 38 L. J. Ch. 155.

(4) (1882) 2 Fca. & Fml. 80.

*Before Sir Asutosh Mookerjee, Knight, Judge,
and Mr. Justice Beachcroft.*

BEPIN BEHARY BERA AND OTHERS

v.

SOSI BHUSAN DATTA AND ANOTHER.*

CIVIL.

1918.

February, 13, 14.

Certificate sale—Purchaser, right of—Adverse possession—Sale of original owner's property—Notice, non-service of, effect of—Serving officer's return of service, value of—Legal representative not brought on record, effect of—Public Demands Recovery Act (I.B.O. of 1895), Secs. 10, 21 cl. (a), (b) and (c)—Civil Procedure Code (Act XIV of 1882), Sec 310A.

A purchaser at a sale under a Public Demands Recovery Act acquires nothing beyond the right, title and interest of the persons mentioned as debtors in the certificate drawn up by the Collector.

The effect of non-service of notice required by section 10 of the Public Demands Recovery Act, upon the judgment-debtor, is that the sale held under the certificate becomes invalid and leaves it open to the original owner when dispossessed to recover possession of the property within 12 years from that date.

Purna v. Dinabandhu (1) referred to.

The return of the serving officer in the certificate procedure, stating that the notice was duly delivered to the judgment-debtor, who acknowledged receipt of the service, is *prima facie* proof of due service of notice.

The effect of the omission of the Court to bring on the record the legal representative of the judgment-debtor who has died after attachment and before sale amounts to irregularity and does not necessarily invalidate the sale, although upon appropriate proceedings taken the sale may be set aside.

Bhoo Prasad v. Hira Lal (2), *Peari Lal v. Ohandi* (3) and *Malharjun v. Narhari* (4) followed.*

Ramasami v. Bagirathi (5), *Krishnaswamy v. Unnisa Begum* (6) and *Groves v. Administrator-General* (7) not followed.

Section 310A of the Code of Civil Procedure (1882) is inapplicable to a sale held under the Public Demands Recovery Act. It is open to the judgment-debtor or his representative to proceed under section 21 of the Public Demands Recovery Act. Under that section, he is bound to deposit, not merely the amounts stated in the certificate as mentioned in clause (a) and the penalty as mentioned in clause (b), but also the outstanding charges due to Government as mentioned in clause (c).

Appeal by the Defendants.

Suit for declaration of title to immovable property and for recovery of possession thereof.

* Appeal from Appellate Decree No. 8673 of 1910, against the decree of Babu TROYLOKYA Nath Som, Subordinate Judge of Midnapur, dated the 20th July, 1910, reversing that of Babu PRABHA Charan Sinha, Munsiff of Midnapur, dated the 7th June, 1909.

(1) (1907) 5 O. L. J. 698; I. L. R. 34 Calo. 811.

(2) (1889) I. L. R. 12 All. 440.

(5) (1883) I. L. R. 6 Mad. 180.

(3) (1904) 5 O. L. J. 80.

(6) (1891) I. L. R. 15 Mad. 399.

(4) (1900) I. L. R. 25 Bom. 377.

(7) (1898) I. L. R. 23 Mad. 119.

* See also, *Net Lal Sahoo v. Shobhit Karan Bua*, (1896) I. L. R. 23 Calo. 686—Rep.

In 1883 the disputed property was sold under the Public Demands Recovery Act and was purchased by A. On default of payment of cesses the property was sold again in 1889 and passed into the hands of B. Notwithstanding these sales the original owners continued in occupation of the disputed property. Default was again made in the payment of cesses and proceedings were taken under the Public Demands Recovery Act against the original owner, with the result that at a sale held on the 14th March 1898, R became the purchaser. The plaintiffs respondents took a conveyance from R on the 15th January, 1900; but in the year following, apprehending that their title may be challenged by the representatives of B they took another conveyance from him. The plaintiffs claimed to recover possession from the representatives of the original owner. The Court of first instance dismissed the suit holding that the sale of 1898 was illegal and invalid; but on appeal the decree was reversed.

CIVIL

1918.

Bepin Behary

v.

Sosi Bhusan,

Babus Mahendra Nath Ray and Bidhu Bhusan Ganguly for the Appellants.

Babus Baidya Nath Dutt and Mohini Nath Bose for the Respondents.

The judgment of the Court was delivered by

February, 14.

Mookerjee J.—This is an appeal by the defendants in a suit for declaration of title to immovable property and for recovery of possession thereof. The subject-matter of the litigation belonged originally to the predecessors in interest of the appellants. In 1883, the property was sold under the Public Demands Recovery Act and was purchased by Asutosh Chakrabarty. On default of payment of cesses the property was sold again in 1889 and passed into the hands of Bepin Chandra Dutt. Later on, default was again made in the payment of cesses and proceedings were taken under the Public Demands Recovery Act, with the result that at a sale held on the 14th March, 1898, Rangalal Bose became the purchaser. The plaintiffs respondents took a conveyance from Rangalal Bose on the 15th January, 1900, but in the year following, apprehensive that their title might be challenged by the representatives of Bepin Chandra Dutt, they took another conveyance from them. The plaintiffs now claim to recover possession from the representatives of the original owner. In the Courts below, a question was raised as to the identity of the lands now in dispute with those sold in 1883 and 1889. That question has now been set at rest and it has been finally held by

CIVIL.

1913.

Bepin Behary

v.
Boni Bhusan.

Mookerjee, J.

the Subordinate Judge that the subject-matter of litigation was sold successively in 1883, 1889 and 1898. The Court of first instance, however, found that the sale of 1898 was illegal and invalid and consequently did not create a title enforceable as against the representatives of the original owners. Upon appeal the Subordinate Judge has reversed the decision of the Court of first instance and made a decree in favour of the plaintiffs. But he has not expressly decided the question of the legality of the sale of 1898. That sale has been attacked before us on four grounds; namely, *first*, that as the certificate under section 10 of the Public Demands Recovery Act was issued in the name of the original owners, namely, Kalachand Bera and his brother, whose interest had been sold out in 1883 and had successively vested in Asutosh Chakrabarty and Bepin Chandra Dutt, no title vested in Rangalal Bose as the purchaser of the right, title and interest of the persons named as judgment-debtors; *secondly*, that as no notice under section 10 of the Public Demands Recovery Act was ever served, the sale did not affect the interest of the owners; *thirdly*, that as at the time of the sale, one of the judgment-debtors was dead, his interest did not vest in the purchaser; and *fourthly*, that as the Deputy Collector illegally refused to record an order for cancellation of the sale, although an application was made as contemplated by law and the necessary amount was deposited, the sale must be deemed inoperative and ineffectual.

In so far as the first of these grounds is concerned, it cannot be disputed that, as laid down by their Lordships of the Judicial Committee in the case of *Mahomed Abdul Hai v. Gujraj Sahai* (1), the purchaser at a sale under the Public Demands Recovery Act acquires nothing beyond the right, title and interest of the persons mentioned as the debtors in the certificate drawn up by the Collector. The question thus arises, whether Gora Chand Bera and Kala Chand Bera in whose names the certificate was issued on the 2nd December, 1897, had any interest in the property at the time. *Prima facie*, their interest had been extinguished in 1883, and Ashutosh Chakrabarty had become the owner of the property. But it has been found by the Subordinate Judge that notwithstanding the sales of 1883 and 1889 the original owners continued in occupation of the disputed property. Their possession was undoubtedly adverse to that of the purchasers at the sales under the Public Demands

(1) (1893) 1 L. B. 25 Calo. 876; L. B. 20 I. A. 70.

Recovery Act. Consequently in 1895, the original owners reacquired title in the property by adverse possession. It follows that when in 1897, the certificate was drawn up in the name of Gora Chand and Kala Chand, they were the owners in law. They were the persons liable to pay the Government demands, and, consequently the purchaser Rangalal Bose in 1898 acquired their right, title and interest in the property. The first ground upon which the sale is questioned cannot be supported.

CIVIL
1918;
Bepin Behary
s.
Bosi Bhushan.
Mookerjee. J.

In so far as the second ground of attack is concerned, it has been argued that the notice required by section 10 of the Public Demands Recovery Act was not served upon the judgment-debtors. It is not disputed that if such a notice was not served, the effect would be to invalidate the sale and would leave it open to the original owners when dispossessed to recover possession of the property within 12 years from that date: *Purna Chandra v. Dinabandhu* (1). But the Subordinate Judge has found that the notice was duly served. No doubt, there is no direct proof of the service of notice. But the return of the serving officer has been produced, and it states on the face of it that the notices were delivered to the judgment-debtors who acknowledged receipt of the service. This is *prima facie* proof of due service of notice, and, so far as we can gather, no effort was made to contradict this evidence. We must take it that notice under section 10 was duly served. The second ground also fails.

In so far as the third ground is concerned, it is not disputed that the judgment-debtor Kala Chand Bera died on the 10th March, 1898. At the time of the sale, this fact was brought to the notice of the Court but the Court proceeded to sell the property. On this, it has been argued that the sale did not operate to affect the interest of Kala Chand Bera; and in support of this proposition reliance has been placed upon the cases of *Ramasami v. Bagirathi* (2), *Krishnayya v. Unnissa Begam* (3) and *Groves v. Administrator-General* (4). These cases, when analysed, do not assist the appellants. No doubt, the learned Judges who decided these cases observed in their judgments that the sale in question was void and inoperative; but they nevertheless proceeded to set aside the sale. On the other hand, it was laid down by a Full Bench of the Allahabad High Court in the case of *Shro Prasad v. Hira Lal* (5), which was accepted as

(1) (1907) 5 C. L. J. 696; I. L. B. 84 Calo. 811.

(2) (1868) I. L. B. 6 Mad. 180.

(4) (1898) I. L. B. 22 Mad. 119.

(3) (1891) I. L. B. 15 Mad. 899.

(5) (1889) I. L. B. 12 All. 440.

CIVIL.

1912.

Bepin Behary

v.

Boni Bhushan.

Meekerjee, J.

good law in *Pari Lal Singh v. Chandi Charan Singh* (1), that the effect of the omission of the Court to bring on the record the legal representatives of the judgment-debtor who has died after attachment and before sale amounts to irregularity and does not necessarily invalidate the sale, although upon appropriate proceedings taken the sale may be set aside. This view is in accord with that taken by their Lordships of the Judicial Committee in *Malkarjun v. Narhari* (2). Their Lordships point out that there can be no question that the omission to serve notice on the legal representatives is a serious irregularity sufficient by itself to entitle the plaintiffs to vacate the sale. But there may be defences to such a proceeding, and justice cannot be done unless those defences are examined by legal methods. Their Lordships point out in a subsequent passage that if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law; and the case must fall either within section 311 of the Code of 1882 or within Article 12 (a) of the Limitation Act of 1877, or within both; so that, in any way, there exists a bar by one year's delay. In the case before us, therefore, the sale must be taken to be a voidable sale which could have been avoided by the persons affected, either by a proceeding under section 311 of the Code of 1882 or by a suit instituted within the period of one year from the date of sale. No such proceeding has been taken and the time within which appropriate proceedings might have been taken has elapsed. Consequently it is not open to the defendants to impeach the validity of the sale by way of defence and as we have already explained, it is not open to them to ignore the sale. This is in accord with the principle explained in the case of *Ramsona v. Sonamala* (3). The third ground accordingly fails.

In so far as the fourth ground is concerned, we notice that the Court of first instance proceeded on the misapprehension that section 310A of the Code of 1882 is applicable to a sale held under the Public Demands Recovery Act. It has not been disputed before us that section 310A is not applicable; its operation is expressly excluded by sub-section 2 of section 19. It was consequently open to the judgment-debtors or their representatives to proceed under section 21. Under that section, they are bound to deposit, not merely the amounts stated in the certificate as mentioned in clause (a) and the penalty as mentioned in clause (b), but also the outstanding charges due to Government

(1) 1906) O. L. J. 80. (2) (1900) I. L. B. 25 Bom 337.

(3) (1911) 1 O. L. J. 404.

as mentioned in clause (c). As far as we can gather the judgment-debtors failed to deposit the amount mentioned in clause (c). But even if it be assumed for a moment that they tendered the full amount contemplated by section 21 and that their offer was improperly rejected by the Collector, his order might have been revised by the superior revenue authorities or possibly the party prejudiced by the alleged illegal order of the Collector might have obtained his remedy by way of a regular suit, appropriately framed and instituted in the civil Court. But it is not necessary to decide what steps might have been taken to set right the erroneous order of the Collector. It is sufficient to say that no such steps were taken and it is not open to the representatives of the judgment-debtor now to urge that the sale was a nullity, not at any rate as against the plaintiffs who are apparently *bona fide* purchasers for value from the purchasers at the sale held under the Public Demands Recovery Act. The fourth ground cannot consequently be supported.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

LACHMI PROSAD CHOWDHURY

v.

JAG MOHAN LAL CHAUBEY.*

*Hindu widow—Unauthorized reduction of rent—Reversioner, if bound—Road-
cess return filed by Hindu widow, if can be used in favour of reversioner—
Case Act (IX B. O. of 1880), Sec. 95—Evidence Act (I of 1872), Sec. 32,
cl. (8)—Collection papers, admissibility of—Person who collected rent,
dead—Additional rent for excess land—Proof.*

A Hindu widow has no authority to affect the estate in her hands by unrestricted disposition in charity; but gifts to Brahmins or to idols to a small extent may be binding upon the estate in the hands of the reversionary heirs.

Jagjeeva v. Deeshunkar (1), *Kupoor v. Soukhrani* (2), *Choeni v. Jussoo* (3) and *Ram Kewal v. Ram KisAoro* (4) referred to.

A Hindu widow during her possession of her husband's estate, reduced the rent payable by a tenant as a reward for services rendered by him:

* Appeals from Appellate Decrees Nos. 2880, and 2881 of 1909 from the decisions of M. K. Deb, Esq., District Judge of Bhagalpur, dated the 26th August, 1909, reversing those of Lala Damodar Prasad, Munsiff of Bhagalpur, dated the 26th February, 1909.

(1) (1812) 1 Bor. 894 (426).

(2) (1809) 1 Bor. 55 (60).

(3) (1815) 1 Bor. 405 (443).

(4) (1895) L. L. R. 23 Calo. 506.

CIVIL.

1913.

Bepin Behary

v.

Sod Bhusan.

Mookerjee, J.

CIVIL.

1913.

February, 28.

CIVIL.

1918.

Lachmi Prasad

v.
Jag Mohan.

Held, that as the alienation was without any necessity or in any way conduced to the spiritual welfare of her husband, the reduction of rent was unauthorised and did not bind the reversioner.

Road cess return is inadmissible in favour of not only the person who filed it but also any person who claims through him or may be deemed to be his representative in interest. A reversioner is not a person who claims through a widow or may be deemed to be her representative in interest.

Section 95 of the Cess Act is not exhaustive and is no bar to the reception of the road cess return in evidence, if it is admissible under any of the provisions of the Indian Evidence Act. Hence a road cess return filed by a Hindu widow is admissible in favour of the reversionary heir under section 82 clause (8) of the Evidence Act.

Chakho Singh v. Jharo Singh (1) and *Sewdeo Narain Singh v. Ajodhya Prasad Singh* (2) referred to

The fact that the man who collected rent as stated in the collection papers was dead does not necessarily render impossible their reception in evidence.

In order to establish that the plaintiff is entitled to additional rent in respect of excess land, the plaintiff must prove that the defendant is in possession of excess land, that is, in possession of land for which he does not pay rent.

Ishan v. Ramranjan (3) and *Rajkumar v. Ram Lal* (4) referred to.

Appeal by the Plaintiff.

Suit for rent.

The plaintiff alleged that the rent payable by the defendant was improperly reduced by the Hindu widow in possession of her husband's estate, to whose estate the plaintiff succeeded as reversionary heir. He further alleged that he was entitled to get additional rent in respect of excess land in occupation of the defendant. In order to prove original rent, the plaintiff relied upon a road cess return filed by or on behalf of the widow while she was in possession of the estate, as also upon collection papers. The lower appellate Court dismissed the suit, holding *firstly*, that the reduction of rent by the widow was an act of charity which bound the estate in the hands of the reversioner; *secondly*, that the road cess return was not admissible in evidence in favour of the reversionary heir; *thirdly*, that the collection papers were not evidence *per se* and were only evidence when produced by the man who collected rent according to them and that man being dead, the papers could never be admissible in evidence, and *fourthly*, that the plaintiff did not establish that the defendant was in possession of excess lands.

Mr. B. Chakraborty, Babus Biraj Mohan Majumdar and Gurudas Sinha for the Appellant.

(1) (1911) I. L. R. 89 Calo 995.

(3) (1905) 2 C. L. J. 125.

(2) (1913) I. L. R. 89 Calo. 1005.

(4) (1907) 5 O. L. J. 538.

Babus Umakali Mukherji and Kulwant Sahay for the Respondent.

The judgment of the Court was delivered by

Mockerjee J.—This is an appeal on behalf of the plaintiff in a suit for rent. The plaintiff alleges that the rent payable by the defendant has been improperly reduced by Rani Radha Chowdhraim who was in possession of the estate as widow of Sheo Nagan Chandinath Chowdhury, the last male full owner to whose estate the plaintiff has succeeded as reversionary heir. The plaintiff further alleges that he is entitled to get additional rent in respect of excess land in the occupation of the defendant. The Court of first instance upheld the first contention of the plaintiff but overruled the second and the result was that the defendant preferred an appeal to the District Judge while the plaintiff preferred a cross appeal. The District Judge has, upon both the points, found against the plaintiff, and made a decree in his favour at the reduced rate. The plaintiff has now appealed to this Court, and on his behalf the two points urged in the Courts below have been reiterated.

In so far as the first ground is concerned, we are clearly of opinion that the view taken by the District Judge cannot be supported. It is not disputed that Rani Radha Chowdhurain was in possession of the estate as a Hindu widow with qualified powers of disposition. She found herself involved in a protracted litigation by reason of unauthorised gifts in favour of her relations; and after those alienations had been pronounced to be beyond the scope of her authority, she reduced the rent payable by the defendant, apparently as a reward for services rendered by him in connection with the litigation. The Court of first instance held that this Act was not binding upon the reversionary heir of the estate of her husband. The District Judge has reversed that decision on the ground that this was an act of charity which binds the estate in the hands of the reversionary heir. We have not been able to discover any authority in support of the view taken by the District Judge. But it is probable that the District Judge misunderstood the decision of the Judicial Committee in the case of *Collector of Masulipatam v. Cavalry Venkata Narrainapah* (1), where Lord Justice Turner thus describes the qualified estate taken by a Hindu widow: "For religious or charitable purposes or those which are supposed to conduce to

CIVIL.

1918.

Lachmi Prasad

Jag Mohan.

February, 28.

(1) (1881) 8 M. I. A. 529 (550).

CIVIL

1918.

Lachmi Prasad

v.

Jag Mohan.

Mookerjee, J.

the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last purpose, she must show necessity." This does not support the view that a Hindu widow has authority to affect the estate in her hands by unrestricted dispositions in charity. No authority can be found for this proposition, although it has been ruled that gifts to Brahmins or to idols to a small extent may be binding upon the estate in the hands of the reversionary heirs: *Fugjeevun v. Deoshunkur* (1), *Kupoor v. Sevukram* (2), *Choonsee v. Fussoo* (3) and *Ram Kamal v. Ram Kishore* (4). But in the case before us the act of the widow cannot be supported as an alienation for which there was necessity; nor can the act be deemed to have in any way conduced to the spiritual welfare of her husband. We are clearly of opinion, therefore, that the reduction of rent was unauthorised and does not bind the reversioner.

The question then necessarily arises, what was the original rent. Upon this part of the case the plaintiff relies upon a road cess return filed by or on behalf of the widow while she was in possession of the estate as also upon the collection papers. The District Judge has held that the road cess return is not admissible in evidence in favour of the reversionary heir. He has referred to section 95 of the Bengal Cess Act of 1880, which provides that every return filed by or on behalf of any person in pursuance of the provisions of the statute shall be admissible in evidence against such person but shall not be admissible in his favour. It is not disputed that such return is inadmissible in favour of not only the person who has filed it but also any person who claims through him or may be deemed to be his representative in interest. The question is, whether a reversionary heir in the position of the plaintiff can be deemed to be a person who claims through the widow or who may be deemed to be her representative in interest. The answer must necessarily be in the negative. A reversionary heir takes the estate direct from the husband of the widow. Consequently section 95 of the Bengal Cess Act, which, as was pointed out in the cases of *Chalko Singh v. Fharo Singh* (5) and *Sewdeo Narain Singh v. Ajodhya Prasad Singh* (6), is not exhaustive, is no bar to the reception of the road cess return in evidence, if it is admissible under any of the provisions of the

(1) (1812) 1 Bor. 394 (486).

(2) (1815) 1 Bor. 405 (418).

(3) (1809) 1 Bor. 85 (80).

(4) (1895) I L R. 22 Calo. 506.

(5) (1911) I. L. R. 39 Calo. 995.

(6) (1912) I. L. R. 39 Calo. 1005.

Indian Evidence Act. There is in our opinion no room for controversy that in this case the road cess return is admissible in evidence under section 32 clause (3) of the Indian Evidence Act. The view taken by the District Judge cannot consequently be supported.

With regard to the collection papers the District Judge observes that they are not evidence *per se* and are only evidence when produced by the man who collected rent according to them. He then states that as that man in the present case is dead the papers can never be admissible in evidence. This view is clearly erroneous. The circumstances under which collection papers may be used in evidence are fully explained in the case of *Akoti v. Tarak Nath Ghose* (1) and the fact that the man who collected rent as stated in the collection papers is dead, does not necessarily render impossible their reception in evidence. The District Judge must therefore consider whether in view of the facts established in this case the collection papers may be treated as corroborative evidence. His decision upon the question of rent originally payable by the defendant cannot consequently be supported.

In so far as the second ground is concerned, the Courts below have concurrently decided it against the plaintiff. In order to establish that the plaintiff is entitled to additional rent in respect of excess land, the plaintiff must prove that the defendant is in possession of excess land; that is, in possession of land for which he does not pay rent: *Ishan v. Ramranjan* (2) and *Rajkumar v. Ram Lal* (3). Now in the case before us, the origin of the tenancy has not been established. It has not been explained how the land was settled with the defendant or his predecessors. All that is known is that in the collection papers of the plaintiff the area in occupation of the defendant is said to be 38 bighas, whereas in the record-of-rights the area is stated to be 49 bighas. From these two facts it is impossible to hold that the plaintiff has established that the defendant is in possession of excess lands. The District Judge has correctly pointed out that according to the standard of measurement at the time of the creation of the tenancy, the land may very well have been 38 bighas whereas according to a different standard of measurement the land is at present stated to be 49 bighas. The second ground therefore fails.

(1) (1912) 16 O. L. J. 828.

(2) (1905) 2 O. L. J. 125.

(3) (1907) 5 O. L. J. 588.

CIVIL
1918.
Lachmi Prasad
Jag Mohan
Mookerjee, J.

CIVIL.

1918.

Lachmi Prasad

v.

Jag Mohan.

Mookerjee, J.

The result is that this appeal is allowed, the decree of the District Judge set aside, and the case remanded to him in order that he may determine upon the evidence on the record the rent originally payable by the defendant. The plaintiff will be entitled to a decree on the basis of the rent so determined. The costs of this appeal will abide the result.

It is conceded that this judgment will govern the other appeal (S. A. 2861 of 1909) in which a similar order will be drawn up.

A. T. M.

Appeals allowed; cases remanded.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

SUPRASANNA ROY

v.

UPENDRA NARAIN ROY.*

CIVIL.

1918.

August, 21, 26, 27.

Receiver—Partition suit—No exclusive occupation by one party—Courses open to Court in appointing Receiver—Party to suit, if and when can be appointed Receiver.

A Court has jurisdiction to appoint a Receiver until the hearing of a partition suit or until further order, even though there is no exclusive occupation by any party,¹ and the Court will not hesitate to do so whenever it is just and convenient. The case for the appointment of a Receiver is much stronger, if a party to the partition action is in sole occupation; in such a case, any of the party may obtain a Receiver either of his share of the rents and profits or of the whole estate. In cases of this description there are four alternative courses open: (1) the Court may require security from the person in sole occupation; (2) the Court may require him to pay occupation rent; (3) the Court may appoint a Receiver of the share of the plaintiff; or (4) the Court may appoint a Receiver of the entire estate.

One of the parties to a litigation should not ordinarily be appointed a Receiver and very exceptional circumstances must be established to justify the appointment of a party as Receiver.

Kali Kumari v. Bachhan Singh (1) followed.

Appeal by the Plaintiff Petitioner.

Application by the plaintiff in a partition suit for the appointment of a Receiver of the subject-matter of litigation.

The plaintiff and the defendant were brothers and were the owners of joint properties of considerable value and extent. On the death of their father, the defendant was appointed guardian

* First Appeal from Order No. 116 of 1918, against the order of Babu Boroja Charan Mitra, Subordinate Judge of Faridpore, dated the 18th March, 1918.

of the person and property of his infant brother, the plaintiff. The latter demanded partition of the family estate, but met with refusal from his brother. The plaintiff in a suit brought for partition, asked for the appointment of a Receiver *pendente lite*. This application was refused by the Court below on the grounds (1) that the plaintiff was not kept out of possession of the joint estate; (2) that under the circumstances of the case, the estate would be managed better by the defendant than by the stranger; (3) that the appointment of a stranger Receiver would mean imposition of a heavy burden upon the estate which was already encumbered to some extent; and (4) that the plaintiff's remedy was to move the District Judge to make an order for an increase of his allowance.

Messrs. S. P. Sinha, C. R. Das, P. R. Das and Babu Romes Chunder Sen for the Appellant.

Mr. B. Chakrabarti, Babus Joges Chunder Roy, Biraj Mohan Mojumdar and Anilendra Nath Roy Chowdhry for the Respondent.

C. A. V.

The judgment of the Court was delivered by

Mookenjee J.—This appeal is directed against an order by which the Court below has rejected an application by the plaintiff in a partition suit for the appointment of a Receiver of the subject-matter of the litigation. The plaintiff and the defendant are brothers and are the owners of joint properties of considerable value and extent. In 1902, after the death of their father, the respondent, the eldest son, took out letters of administration of the estate with a copy of the will annexed. He was at the same time appointed guardian of the person and property of his infant brother, the present plaintiff, who went to England in 1906 and came back three years later. On his return, he demanded partition of the family estate, but met with refusal from his brother. Accordingly, the plaintiff sued for partition in 1910. On the 22nd February, 1910, a consent decree was made in the suit, under which the properties were to be divided and allotted to the two brothers. Arbitrators were appointed to make the division, but the partition was not carried out for reasons which need not be recited for our present purpose. On the 31st January, 1912, the plaintiff commenced this fresh action for partition either on the basis of the award of the arbitrators or irrespective of it. On the 22nd November, he asked for the appointment of a Receiver *pendente lite*. This application has been refused by the

Orville

1913.

Suprasanna

Upendra Narain.

August, 27.

CIVIL.

1918.

Suprasanna

Upendra Narain.

Mookerjee, J.

Court below on four grounds; namely, *first*, that as the plaintiff has from time to time received from his brother, who is in possession of the estate, various sums of money, it cannot be said that the plaintiff has been kept out of possession of the joint estate; *secondly*, that under the circumstances of the case, the estate will be managed better by the defendant than by a stranger as Receiver; *thirdly*, that the appointment of a stranger Receiver would mean imposition of a heavy burden upon the estate which is already encumbered to some extent; and *fourthly*, that if the plaintiff is not satisfied with the amount he has received from his brother, his obvious remedy is to move the District Judge to make an order for an increase of his allowance. In our opinion, these reasons do not justify a refusal of the application for the appointment of a Receiver.

Upon the facts stated, it is plain that the title of the plaintiff to one-half share of the estate cannot be disputed. The plaintiff has attained majority and is entitled to the enjoyment of his share. When the partition is effected, he will be entitled to take his share severally but so long as partition is not effected, he is clearly entitled to receive approximately one-half share of the net income of the estate. This aspect of the matter was not appreciated by the Court below, and as the Subordinate Judge has made an order which is manifestly erroneous, it is desirable to explain the principles applicable to a case of this description. At one time, it was held in England that as between legal co-owners of land, the Court of Chancery would not appoint a Receiver unless by consent: *Ramsden v. Fairthorp* (1); or unless the applicant was prevented from exercising his legal rights of entering into possession and sharing in the management. *Milbank v. Revett* (2) and *Spratt v. Ahearns* (3). In the same way, as between equitable co-owners, exclusive occupation by one owner in the sense that he refused to pay to his co-owners their proper share of the rents and profits, has always been deemed a good ground for the appointment of a Receiver. *Tyson v. Fairclough* (4). After the Judicature Act however, it has been repeatedly held that the Court has jurisdiction to appoint a Receiver until the hearing of a partition action or until further order, even though there is no exclusive occupation by any party, and the Court will not hesitate to do so whenever it is just and convenient. The case for the appointment of a

(1) (1868) 1 N. R. 889.

(3) (1834) 1 Jones 50.

(2) (1817) 2 Mer. 406.

(4) (1834) 2 Blm & St. 142.

Receiver is much stronger, if a party to the partition action is in sole occupation; in such a case, any other party may obtain a Receiver either of his share of the rents and profits or of the whole estate: *Sandford v. Ballard* (1), *Sandford v. Ballard* (2), and *Porter v. Lopes* (3). The Court may also allow the party in exclusive occupation to elect to pay to the other an occupation rent [*Teasdale v. Sanderson* (4),] or the Court may require security from the co-owner in exclusive-occupation to account for their share of the rents to the other co-owners. *Street v. Anderton* (5). Consequently, in cases of this description there are four alternative courses open: (1) the Court may require security from the person in sole occupation; (2) the Court may require him to pay occupation rent; (3) the Court may appoint a Receiver of the share of the plaintiff or, (4) the Court may appoint a Receiver of the entire estate.

In the case before us, there is no room for controversy that a Receiver should be appointed in respect of the whole estate. The plaintiff is, as already stated, the owner of one-half share of the estate. He has attained majority, is a married man and has a family to support. He is further engaged in this litigation and has to bear heavy expenses. If the defendant is directed to furnish security, the order would be of no avail to the plaintiff, and would not afford him immediate relief in the least degree. If the defendant is directed to pay occupation rent, the plaintiff would be entitled to claim one-half share of the income of the estate. But it would be difficult, if not impracticable, to carry out the order, because the parties are hopelessly at variance as to the amount of the annual income which has been estimated at figures varying from Rs. 30,000 to Rs. 50,000. If a Receiver is appointed in respect of the one-half share of the plaintiff, there will obviously be an immediate conflict between the Receiver and the defendant, and the management of the estate will be completely paralysed. Under these circumstances, the only feasible and practicable course which can be adopted without detriment to the parties is to appoint a Receiver of the whole estate.

The next question for consideration is, who should be appointed Receiver. As pointed out by this Court in the case of *Kali Kumari v. Bachhun Singh* (6), one of the parties to a litigation should not ordinarily be appointed a Receiver and very exceptional circumstance must be established to justify the appointment of a party as Receiver. In our opinion, in the

Civil

1912.

Suprasanna

Upendra Narain.

Hobart, J.

(1) (1861) 80 Beav. 109.

(2) (1864) 33 Beav. 401.

(3) (1877) 7 Ch. D. 353.

(4) (1864) 33 Beav. 534.

(5) (1798) 4 Brown C. C. 414.

(6) (1913) 17 O. W. N. 974.

Civil,

1918.

Suprasanna

vs.
Upendra Narain.

Mookerjee, J.

present case such grounds have been made out. The appointment of a stranger would mean the imposition of a heavy burden upon the estate which is already encumbered ; and it might also tend to dislocate the management. The defendant, on the other hand, has offered to accept the appointment as Receiver if the Court decides that a Receiver should be appointed. He has further agreed to bring into Court Rs. 10,000 within two weeks from this date, for payment to the plaintiff ; he has also consented to bring into Court Rs. 10,000 a year in four equal instalments for payment to the plaintiff. In view of the offers thus made, we are of opinion that the defendant may very well be appointed Receiver. We accordingly appoint him Receiver with effect from this date. His share of the joint estate in controversy will remain as security for the due performance of his duties as Receiver. He will bring into Court Rs. 10,000 within fourteen days from this date. As soon as the money is deposited in this Court, it will be paid out on the joint receipt of the plaintiff and his trustees who are parties to the suit. No further order from the Court will be required in this behalf. As regards the sum of Rs. 10,000 which the defendant undertakes to bring into Court annually in four equal instalments, we direct that the first instalment of Rs. 2,500 be deposited in this Court on or before the 31st October next. As soon as the money is deposited it will be paid out on the joint receipt of the plaintiff and his trustees. The subsequent instalments of Rs. 2,500 each will similarly be deposited in this Court upon the expiration of every period of three months and will be similarly paid out to the plaintiff and his trustees on their joint receipt. The Receiver will in all matters act under the direction of the Subordinate Judge. As regards the submission of accounts, we direct that the Receiver do submit his accounts every three months in the Court of the Subordinate Judge. If the Receiver fails to deposit Rs. 10,000 as directed, or to deposit Rs. 2,500 every three months as ordered above, he will be discharged and the Subordinate Judge will proceed forthwith to appoint another person as Receiver. At the end of twelve months from this date, the parties will be at liberty to apply to this Court to vary this order as regards the annual payment of Rs. 10,000.

The appellant is entitled to his costs of this appeal. We assess the hearing fee at five gold mohurs. Let the record be sent down at once so that the hearing of the suit may be expedited.

A. T. M.

Appeal allowed.

CIVIL RULE.

Before Mr. Justice Coxe and Mr. Justice D. Chatterjee.

BAIJNATH PRASAD SINGH AND ANOTHER

v.

SHAM SUNDER KUER.*

CIVIL.

1918.

November, 25.

Probate proceeding—Costs—Pleader's fee, assessment of—General Rules and Circular Orders of the High Court, Appellate Side, Vol. I—Chap. VI, Rules 28A, 42A—Chap. X, Rule 28—Probate and Administration Act (V of 1881), Sec. 83.

In awarding costs in a probate proceeding the pleader's fee is to be assessed under Rule 42A of Chapter VI of the General Rules and Circular Orders of the High Court, Appellate Side, and not according to the valuation of the property covered by the probate †.

Application for revision by Baijnath Prosad Singh and another, Objectors, Judgment-debtors.

The opposite party, Musammat Sham Sunder Kuer, made an application to the Court of the District Judge of Mozufferpur for grant of Letters of Administration with a copy of a will annexed; and the above-named objectors filed a petition of objection to the granting of the same. The learned District Judge overruled the objections of the caveators, and ordered grant of Letters of Administration with costs. A decree was prepared, and the pleader's fee of the applicant was assessed at Rs. 777 according to the value of the property in respect of which probate was given. The caveators thereupon made an application to the District Judge under section 152 of the Code of Civil Procedure for amendment of the decree, stating that the amount of costs entered in the decree was in contravention of the provisions of High Court Rules and Circular Orders under which Rs. 80 was the maximum fee payable to pleaders in such cases. The learned District Judge rejected the application on the ground that a probate proceeding should be regarded as a suit for the purpose of awarding pleader's fees.

Against the order of the learned District Judge the objectors made an application to the High Court and obtained this Rule.

Babu Dharendra Lal Khastgir for the Petitioners. Under Rule 42A of Chap. VI of the General Rules and Circular Orders of the High Court, Appellate Side, Vol. I, a fee of Rs. 80 was the maximum fee that could be allowed to the opposite party

* Civil Rule, No. 928 of 1918, against the order of the District Judge at Musafferpur in Suit No. 12 of 1911, (Act V case).

† See in this connection *Ameer Chand v. Mahannad Bibi* (1907) 6 O. L. J. 453—Ed.

CIVIL

1912.

Baljnath Prasad

Sham Sunder

as pleader's fee in the probate proceeding. In fixing the fees a Probate Court acts under the Circular Orders and Rules framed under section 27 of the Legal Practitioners Act. Refers to Rule 36A of Chap. VI of the High Court Circular Orders. In a probate proceeding the only question to be decided is whether the will was duly executed and was a genuine document; it does not decide any question as to title or interest to the property which that document covers. Section 83 of the Probate and Administration Act, referred to by the Court below, rather supports the petitioner's case inasmuch as if probate proceedings were suits it would be unnecessary to enact that they should take the form of suits. Relied on the case of *Sundrabai Sahab v. The Collector of Belgaum* (1) and submitted that the case of *Umrao Chand v. Bindrajan Chand* (2) relied on by the learned District Judge had no application.

Babu Buldeo Narain Singh for the Opposite Party. Petitioners cannot ask for interference under section 115 of the Code of Civil Procedure. They applied for amendment of the decree, and it has not been shewn that the decree was not in accordance with the judgment. Their remedy, if any, was to apply for review of the judgment. High Court has in such cases refused to exercise its revisional powers.

Ad valorem pleader's fees are assessed in awarding costs in probate proceedings according to the established practice of lower Courts. Under Rule 26 of Chap. X of the High Court Rules and Circular Orders, an application for probate is to be treated as a suit as soon as it is contested. It is no longer a miscellaneous case, and *ad valorem* fees ought to be allowed. Even in High Court probate appeals are called Regular Appeals. The practice in Bombay is not the same as it is here. Relied on the cases of *Sheikh Azim v. Chandra Nath Namdas* (3) and *Ramnandan Pershad v. Sheoparsan Singh* (4) in support of his contention.

The judgment of the Court was delivered by

Coxe J.—This application arises out of a probate case. Probate was granted and the petitioners were directed to pay the costs of the opposite party. Subsequently a decree was prepared and the pleader's fees of the opposite party were assessed at Rs. 777, according to the value of the property in respect of which probate was given. This is said to be in accordance with

(1) (1908) I. L. R. 33 Bom 253.

(3) (1904) 8 O. W. N. 748.

(2) (1895) I. L. R. 17 All 475.

(4) (1910) 11 O. L. J. 628.

November, 25.

the practice of the Muzafferpore District Judge's Court. The petitioners then applied to have the decree amended alleging that a fee of Rs. 80 only could be allowed under Rule 42 A, Chap. VI of the Rules and Orders. This application was refused by the District Judge and it has now come up to this Court in revision.

It is contended by the learned pleader for the petitioners that a proceeding under the Probate and Administration Act 1881 is a miscellaneous proceeding and that Rule 42A which we have cited will apply. It is argued, however, on the other side that this proceeding is a regular suit and reference is made to Rule 26, Chap. 10 of the Rules and Orders which lays down that for the purposes of the returns, these applications should be treated as miscellaneous cases until they are contested; and as suits thereafter. This Rule was however framed for administrative convenience and is intended to assist subordinate Courts in drawing up their statements and returns but it does not throw any light on the present difficulty.

It is also contended that under section 83 of the Probate and Administration Act, 1881, which lays down that in contested probate cases, the proceedings shall take as nearly as may be, the form of a suit, according to the provisions of the Code of Civil Procedure, this proceeding must be regarded as a regular suit. But these provisions appear to us to tell rather against the opposite party than in his favour. If these proceedings are suits it would be unnecessary to enact that they should take the form of suits. Even if the proceeding is a suit the only rule under which an *ad valorem* pleader's fee can be assessed is Rule 36A of Chap. 6 of the Rules and Orders. That Rule provides that "generally in all suits not included in Rule 35, if the plaintiff succeed the Court may order the fee of the pleader for the plaintiff to be calculated with reference either to the amount decreed or according to the valuation of the suit or according to such a sum not exceeding the valuation as the Court shall think reasonable." Here no amount has been decreed and it appears to us that the valuation of the property covered by the probate cannot reasonably be regarded as the valuation of the suit. The extent or value of the property and the rights of the testator therein are irrelevant in probate proceedings which are confined entirely to the question whether the petitioner is or is not entitled to probate of the document executed by the testator irrespective entirely of the property which that document covers. Rule 36A seems to us, therefore, to have no application and no other rule authorises assessment of *ad valorem* fees.

CIVIL.

1918.

Bajjnath Prasad

Sham Sunder.

Ome, P.

CIVIL

1913.

Baijnath Prasad

Sham Sunder,

Cous, J.

In our opinion, therefore, the fee can only be assessed under Rule 42A.

That there is a distinction between this proceeding and a regular suit will appear from the practice of this Court. In regular appeals valued at over Rs. 5,000 pleader's fees are assessed *ad valorem* automatically whereas in probate cases of above that value, hearing fees are assessed by the Judges themselves in each case.

In our opinion, therefore, the pleader's fee in the Court below should be reduced to the sum of Rs. 80. The Rule is made absolute to that extent.

We pass no order as to costs.

A. N. R. C.

Rule made absolute.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

PEARY LAL DAS

v.

PEARY LAL DAWN.*

CIVIL.

1913.

August, 28.

Rateable distribution—Civil Procedure Code (Act V of 1908), Secs. 73, 115.

—Fraudulent decree—Summary enquiry—Acting with material irregularity—Decision based on evidence not taken in accordance with law—Evidence Act (I of 1872), Sec. 165.

An execution Court has jurisdiction under section 73 of the Code of Civil Procedure to hold a summary enquiry as to fraudulent character of a decree obtained by one of the decree-holders claiming rateable distribution.

Puran Chand Baid v. Surendra Narain Singh (1) followed.

A Court acts with material irregularity in the exercise of jurisdiction, when its decision is based upon evidence not taken in accordance with law.

An examination of a witness by a Court should not take place without notice to the parties or their pleaders and without affording any opportunity to cross-examine him or to rebut his statement. Section 165 of the Evidence Act does not justify such a procedure.

Application for revision by the Decree-holder.

Application for rateable distribution.

The opposite party who obtained a decree against the person against whom the petitioner also obtained a decree, contended that the decree of the petitioner was a fraudulent one. The lower Court after examining the judgment-debtor without giving notice to the parties or their pleaders and without affording them any opportunity to cross-examine him or to rebut his statement, held that the decree was fraudulent.

* Civil Rule No. 932 of 1913, against an order of Babu Baroda Prasad Roy, Subordinate Judge of Hooghly, dated the 21st May, 1913.

(1) (1912) 6 C. L. J. 582.

Babus Biraj Mohan Mojumdar and Dwijendra Nath Mukherjee for the Petitioner.

Babus Mohini Mohan Chatterjee and Probodh Chunder Dutt for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee J.—We are invited in this Rule to set aside an order made by the Court below under section 73 of the Code of Civil Procedure of 1908. The petitioner Peary Lal Das obtained a decree for money on the 3rd September, 1912, against Hari Das Nandi and his four brothers. He applied for execution on the 16th September, 1912. The opposite party Peary Lal Dawn had obtained a decree for money against the same judgment-debtors on the 4th July, 1911. He had applied for execution of his decree on the 23rd July, 1911. In that execution two properties of the judgment-debtor had been sold and a further application had been made for sale of the other properties of the judgment-debtors. Peary Lal Das on the 11th September, 1912, applied for rateable distribution in the execution proceedings instituted by Peary Lal Dawn. The sale which had been advertised to take place on the 13th September was however not held. On a subsequent date, duly notified, the sale was again adjourned. Shortly after this, Peary Lal Dawn applied for rateable distribution in the execution proceedings commenced by Peary Lal Das. This application was presented on the 13th June, 1913. The position, therefore, was that in the execution proceedings commenced by Peary Lal Das, there was an application for rateable distribution by Peary Lal Dawn, and in the proceedings for execution commenced by Peary Lal Dawn, there was an application for rateable distribution by Peary Lal Das. On the 13th February, 1913, Peary Lal Dawn, however, objected to the application for rateable distribution by Peary Lal Das on the allegation that the decree obtained by the latter was fraudulent. The Subordinate Judge held an enquiry into this matter, and, on the 24th May, 1913, decided that the decree of Peary Lal Das was fraudulent as alleged by Peary Lal Dawn. We are now invited to set aside this order on two grounds; namely, *first*, that the Subordinate Judge had no jurisdiction to hold a summary enquiry into this matter; and *secondly*, that if he had jurisdiction to hold an enquiry, he had acted with material irregularity in the exercise of such jurisdiction, inasmuch as his decision is based upon evidence not taken in accordance with law.

In so far as the first ground is concerned, it cannot be

CIVIL
1913.
Peary Lal.
Peary Lal.
August, 23

CIVIL

1912.

Peary Lal

Peary Lal

Mookerjee, J.

maintained in view of the decision of this Court in the case of *Puran Chand Baid v. Surendra Narain Singh* (1).

In so far as the second objection is concerned, it must in our opinion succeed. As appears from the order recorded by the Subordinate Judge, the evidence on behalf of the parties had been adduced, arguments addressed to the Court and judgment reserved on the 24th May, 1913. The Subordinate Judge states that after hearing arguments for nearly two hours, he was thinking what to do and going through the evidence, but could not decide in his mind what to do; he then took up another case in which he heard the arguments and wrote out judgment; at this stage, a person appeared in the witness-box and said that he was the judgment-debtor Hari Das Nandi. The Subordinate Judge thereupon examined him. This examination took place without notice to the pleaders for the parties. What effect his deposition produced in the mind of the Subordinate Judge it is impossible to state with certainty. But the Subordinate Judge records in one part of his order that from what Hari Das Nandi stated to him it appeared to him that he had set-up Peary Lal Das to carve out a portion of the sale proceeds of his property published for sale. It is plain, therefore, that the statements made by Hari Das Nandi must have prejudiced the Subordinate Judge against Peary Lal Das. Now it cannot be disputed for a moment that this examination of Hari Das Nandi should not have taken place without notice to the parties or their pleaders, and without any opportunity afforded to them to cross-examine him or to rebut his statements. Section 165 of the Indian Evidence Act upon which reliance is placed by the opposite party, clearly does not justify the procedure adopted by the Judge. It is further worthy of note that the Subordinate Judge has omitted to consider a very material aspect of the case. As already stated, the application for rateable distribution by Peary Lal Das was made in the execution proceeding of Peary Lal Dawn on the 11th September, 1912. At that time, Peary Lal Dawn did not object that the application for rateable distribution should be disallowed inasmuch as the decree on which it was based was fraudulent. More than this, on the 13th January, 1913, Peary Lal Dawn himself made an application for rateable distribution in the execution proceedings instituted by Peary Lal Das. This application could have been made only on the assumption that the decree obtained by Peary Lal Das was a genuine and valid

decree capable of execution. No doubt, it is conceivable that Peary Lal Dawn had reason to suspect the genuineness of the decree of Peary Lal Das, only after his own application of the 13th January, 1913, and that it was for this reason that he did not, before the 13th February, 1913, take exception to the application for a rateable distribution by Peary Lal Das. The circumstance that objection was not taken till the 13th February, 1913, does however, stand in need of explanation, which can be furnished only by him. This is plainly a matter which cannot be decided on affidavits. If Peary Lal Dawn fails to establish that it was not till after the 13th January, 1913 that he had reason to suspect the fraud which on the 13th February he imputed to Peary Lal Das, his objection to the rateable distribution should not be entertained. This aspect of the case has been completely ignored by the Subordinate Judge.

The result is that this Rule is made absolute and the order of the Court below set aside. The case will be remitted to the Subordinate Judge in order that he may take up the objection to rateable distribution made by Peary Lal Dawn on the 13th February, 1913, and deal with the matter in accordance with law.

We find that the execution proceedings commenced by Peary Lal Dawn have been dropped. The effect of our order will be to revive those proceedings. We also find that the Subordinate Judge after he had disposed of the objection of Peary Lal Dawn to the application by Peary Lal Das for rateable distribution proceeded to record an order in the execution proceedings commenced by Peary Lal Das to the effect that that case also was dismissed. It was clearly not competent to him to make this order. That order will stand discharged, as it was founded on the order in the rateable distribution proceedings which we have now set aside. The effect will be to revive the execution proceedings commenced by Peary Lal Das. The position will be that both the execution cases will stand revived and the Subordinate Judge will proceed to deal with the question of rateable distribution. There will be no order for costs in this Court.

A. T. M.

Rule made absolute.

CIVIL

1913.

Peary Lal

v.

Peary Lal

Mookerjee, J.

INDEX OF CASES.

Volume XVIII.

Abandonment and surrender, difference between; <i>see</i> Non-transferable occupancy holding	193
Abatement of rent for services rendered, by Hindu widow, if binds reversioner; <i>see</i> Hindu widow	633
Abwab —Landlord, if can realise, on a particular potta executed before the passing of the Bengal Tenancy Act—Selami and Tehwar—Part of rent—Regulation V of 1812, Sec. 3—'Definite clause in the engagement contracted between parties'. If a particular sum specified in the lease or agreed to be paid is the lawful consideration for the use and occupation of the land, that is to say, if it is really part of the rent, although not described as such, the landlord would be entitled to recover the same and the whole question in the case is whether the items claimed are really part of the rent, which was the consideration for the letting out of the land. Where a permanent tenure was created by a lease dated 31st January, 1874 and in this lease it was specifically provided and agreed that the lessee should pay to the lessor year by year a fixed sum of Rs. 4,310, of which the sum of Rs. 4,300 was described as <i>jama</i> , Rs. 5 as <i>selami tomji</i> and Rs. 5 as <i>tehwari dasahra</i> : <i>Held</i> , that the stipulation for the payment of <i>selami</i> and <i>tehwari</i> was not a stipulation or reservation for the payment of arbitrary or indefinite cesses but in the language of section 3 of Regulation V of 1812 was "a definite clause in the engagement contracted between the parties" which should be "maintained and given effect to." Kumar Kalanand Singh v. Eastern Mortgage Agency, Co., Ltd.	83
Accused , if to deny—Fact not legally proved; <i>see</i> Contempt of subordinate criminal Court	452
Acknowledgment of obligation by third person in favour of plaintiff—Contract Act, sec. 62; <i>see</i> Novation	603
Acquisition for certain purpose, if can be abandoned; <i>see</i> Land acquisition	244
Act XI of 1859 , Sec. 7	97
Act XI of 1859 , Sec. 13	505
Act XLV of 1860 , Sec. 365	578
Act XLV of 1860 , Sec. 366	578
Act I of 1869 , Secs. 2, 3, 8	200
Act I of 1869 , Secs. 3, 2, 8	200
Act I of 1869 , Secs. 8, 2, 3	200
Act VII of 1870 , Sec. 4	133
Act VII of 1870 , Sch. I, Art. 11 and Sch. I I	308
Act I of 1872 , Secs. 10, 30	590
Act I of 1872 , Sec. 11	567
Act I of 1872 , Sec. 14	578
Act I of 1872 , Secs. 30, 10	590

Act I	of 1872, Sec. 32 cl. (3)	...	...	...	633
Act I	of 1872, Sec. 44	...	...	...	264
Act I	of 1872, Sec. 92	...	...	...	228
Act I	of 1872, Sec. 115	...	...	...	181
Act I	of 1872, Sec. 118	...	...	...	582
Act I	of 1872, Sec. 165	...	...	...	646
Act IX	of 1872, Sec. 23	...	...	...	337
Act IX	of 1872, Sec. 25, Sub-Sec. (3)	...	...	...	269
Act IX	of 1872, Sec. 62	...	...	...	603
Act IX	of 1872, Secs. 203, 204, 208	...	...	...	621
Act IX	of 1872, Secs. 204, 203, 208	...	...	...	621
Act IX	of 1872, Secs. 208, 203, 204	...	...	...	621
Act X	of 1873, Sec. 13	...	...	...	582
Act I	of 1877, Sec. 42	...	...	...	384
Act III	of 1877, Sec. 77	...	...	...	45
Act XV	of 1877, Sec. 5, Sch. II, Art. 158	...	...	...	35
Act XV	of 1877, Sch. II, Art. 105	...	...	...	13
Act XV	of 1877, Sch. II, Arts. 143, 144	...	...	...	553
Act XV	of 1877, Sch. II, Arts. 144, 143	...	...	...	553
Act XV	of 1877, Sch. II, Art. 158, Sec. 5	...	...	...	35
Act V	of 1881, Sec. 83	...	...	...	643
Act IV	of 1882, Sec. 43	...	...	...	181
Act IV	of 1882, Sec. 89	...	...	...	133
Act IV	of 1882, Sec. 90	...	...	...	133
Act XIV	of 1882, Sec. 310 A	...	...	...	628
Act XIV	of 1882, Sec. 317	...	...	...	616
Act XIV	of 1882, Sec. 441	...	...	...	384
Act XIV	of 1882, Sec. 443	...	...	...	384
Act XIV	of 1882, Sec. 462	...	...	...	1,384
Act XIV	of 1882, Sec. 522	...	...	...	35
Act VIII	of 1885, as amended by Act I of 1907 B C Sec. 67	...	...	...	175
Act VIII	of 1885, Sec. 22 (b), before amendment	...	...	...	268
Act VIII	of 1885, Sec. 29 Cl. (b)	...	...	...	502
Act VIII	of 1885, Secs. 29, 43	...	...	...	74
Act VIII	of 1885, Secs. 43, 29	...	...	...	74
Act VIII	of 1885, Secs. 50 (a), 106	...	...	...	76
Act VIII	of 1885, Secs. 53, 173 Sub-Sec. (3) Cl. (h)	...	...	...	175
Act VIII	of 1885, Sec. 85 Sub-Sec. (3)	...	...	...	252
Act VIII	of 1885, Secs. 85, 87	...	...	...	193
Act VIII	of 1885, Sec. 86, Sub-Secs. (5) and (6)	...	...	...	257
Act VIII	of 1885, Sec. 86, Sub-Secs. (6) and (5)	...	...	...	257
Act VIII	of 1885, Secs. 87, 85	...	...	...	193
Act VIII	of 1885, Sec. 104 E	...	...	...	566
Act VIII	of 1885, Sec. 104 F	...	...	...	566
Act VIII	of 1885, Sec. 104 H	...	...	...	566
Act VIII	of 1885, Secs. 104, 50 (a)	...	...	...	76
Act VIII	of 1885, Sec. 107	...	...	...	128
Act VIII	of 1885, Sec. 108	...	...	...	125
Act VIII	of 1885, Sec. 109 A. Sub-Sec. (2)	...	...	...	125
Act VIII	of 1885, Sec. 160 (c)	...	...	...	170

Act VIII of 1885 , Sec. 161 Cl. (a)	252
Act VIII of 1885 , Sec. 167	170
Act VIII of 1885 , Sec. 170, Sub-Sec. (3)	142
Act VIII of 1885 , Sec. 174	533
Act VIII of 1885 , Secs. 178 Sub-Sec. (3) Cl. (h), 53	175
Act VIII of 1885 , Sch. III, Art. 3	86, 89
Act VIII of 1885 , Sch. III, Art. 3 Cl. (a)	597
Act VIII of 1885 , Sch. III, Art. 3, as amended by Act. I (B. C.) of 1927	274
Act VIII of 1885 , Sch. III, Art. 6	81
Act IX of 1890 , Secs. 77, 140	147
Act I of 1894 , Sec. 23, Sub-Sec. (4)	244
Act I of 1894 , Sec. 54	123
Act V of 1898 , Sec. 118	119
Act V of 1898 , Sec. 106	452
Act V of 1898 , Secs. 236, 237	514, 574
Act V of 1898 , Secs. 237, 236	514, 574
Act V of 1898 , Sec. 307 Cl. (c)	522
Act V of 1898 , Sec. 417	519
Act V of 1898 , Sec. 422	582
Act V of 1898 , Sec. 525	150
Act III of 1907 , Sec. 16	564
Act III of 1907 , Sec. 20	564
Act III of 1907 , Sec. 22	359
Act III of 1907 , Sec. 45 Cl. (3)	564
Act V of 1908 , Sec. 2 (2)	78
Act V of 1908 , Sec. 47	264
Act V of 1908 , Sec. 73	646
Act V of 1908 , Sec. 73, O XXI, R. 89	144
Act V of 1908 , Sec. 80	566
Act V of 1908 , Sec. 97	321
Act V of 1908 , Sec. 98	384
Act V of 1908 , Sec. 99	260
Act V of 1908 , Secs. 99, 115	613
Act V of 1908 , Sec. 103	260
Act V of 1908 , Sec. 107, O XI, Rr. 23, 25	613
Act V of 1908 , Sec. 109	124
Act V of 1908 , Sec. 115	533, 594, 646
Act V of 1908 , Secs. 115, 99	613
Act V of 1908 , Sec. 151	9
Act V of 1908 , O IX, R. 3, O. XII, R. 3	9
Act V of 1908 , O. IX, R. 8	128
Act V of 1908 , O. XII R. 3, O. IX R. 3	9
Act V of 1908 , O. XXI, R. 4	621
Act V of 1908 , O. XXI, R. 17 Sub-R. (2)	538
Act V of 1908 , O. XXI, Rr. 23, 25, Sec. 107	613
Act V of 1908 , O. XXI, Rr. 25, 23, Sec. 107	613
Act V of 1908 , O. XXI, R. 89, Sec. 73	144
Act V of 1908 , O. XXI, R. 101	138
Act V of 1908 , O. XXII R. 3	141

Act V of 1908 , O. XXII, R. 3, O. IX, R. 3 ...	39
Act V of 1908 , O. XXXIX, R. 1 ...	39
Act IX of 1908 , Sec. 2 Cl. (5) ...	399
Act IX of 1908 , Sec. 18 ...	533
Act IX of 1908 , Sec. 23 ...	599
Act IX of 1908 , Sec. 28 ...	601
Act IX of 1908 , Sch. I. Art. 24 ...	352
Act IX of 1908 , Sch. I. Art. 143 ...	274, 601
Act IX of 1908 , Sch. I. Art. 176 ...	9
Act VII (B. C.) of 1868 , Sec. 12—Annulment—Gardens not permanent; <i>see</i> Raiyati interest ...	232
Act IX B. C. of 1880 , Sec. 95 ...	633
Act II B. C. of 1882 , Secs. 54, 56, 59, 68, 69, 74 ...	337
Act II B. C. of 1882 , Secs. 56, 54, 59, 68, 69, 74 ...	337
Act III B. C. of 1882 , Secs. 59, 54, 56, 68, 69, 74 ...	337
Act II B. C. of 1882 , Secs. 68, 54, 56, 59, 69, 74 ...	337
Act II B. C. of 1882 , Secs. 69, 54, 56, 59, 63, 74 ...	337
Act II B. C. of 1882 , Secs. 74, 54, 56, 59, 63, 69 ...	337
Act I B. C. of 1895 , Sec. 10 ...	628
Act I B. C. of 1895 , Sec. 21 Cls. (a), (b), (c) ...	628
Act I B. C. of 1895 , Sec. 21 Cls. (b), (a), (c) ...	628
Act I B. C. of 1895 , Sec. 21 Cls. (c), (a), (b) ...	628
Act III B. C. of 1906 ...	356
Act V (B. C.) of 1909 , Secs. 2(12), 46, 46(a), 52, 61 ...	514
Act V (B. C.) of 1909 , Secs. 2(12), 46, 61 ...	567
Act V (B. C.) of 1909 , Secs. 46, 2(12), 46(a), 52, 61 ...	514
Act V (B. C.) of 1909 , Secs. 46, 2(12), 61 ...	567
Act V (B. C.) of 1909 , Secs. 46(a), 2(12), 46, 52, 61 ...	514
Act V (B. C.) of 1909 , Secs. 52, 2(12), 46, 46(a), 61 ...	514
Act V (B. C.) of 1909 , Secs. 61, 2(12), 46 ...	567
Act V (B. C.) of 1909 , Secs. 61, 2(12), 46, 46(a), 52 ...	514
Acting with material irregularity in exercise of jurisdiction—Decision based on evidence not taken in accordance with law—Revision; <i>see</i> Rate- able distribution ...	646
Admissibility —Contract subject to qualification—Similar contracts with others; <i>see</i> Jagir ...	277
Admissibility — <i>Letter self-disserving</i> — <i>Letter intercepted</i> —'Import'— <i>Bengal Excise Act (V. B. C. of 1909)</i> , Secs. 2(12), 46, 61— <i>Articles intercepted by Customs House, if brought into Bengal.</i>	

A letter written by an accused person, when self-disserving is *prima facie* evidence against him, if it relates distinctly to a relevant point; it is not necessary that it should be signed; it is enough if it is traced to the writer, and it is admissible though it may have been intercepted or surreptitiously detained and opened and never in fact reached the addressee.

The fact that a reply from Porter & Co. posted immediately after the telegram purporting to be sent by C. Barker and referring to the telegram, was addressed to the accused, is a relevant fact under section 11 of the Indian Evidence Act and cogent evidence to show that the accused was the sender of the telegram.

The term 'Import' as used in the Bengal Excise Act has a very wide significance.

Admissibility—(Contd.)

Though an article may be actually within the geographical limits of Bengal, it cannot be said to have been brought into Bengal, if it has been intercepted at the Customs House. **C. H. Booth v. Emperor** ... 569

Adoption of married orphan—Agarwal Banias of Zira in the Punjab—
Custom; *see* Hindu Law—Adoption ... 70

Adverse possession of *Makarridar*, when available against *Zemindar*, *see* *Hikimali* tenure ... 23

Agent's authority, if can be revoked by one—Authority conferred by two or more principals; *see* *Lambardar* ... 621

Agent's authority, revocation of, when takes place as regards third persons; *see* *Lambardar* ... 621

Agent's authority, revocation of, when takes place; *see* *Lambardar* ... 621

Agent's authority, revocation of—Third person—Notice, nature of; *see* *Lambardar* ... 621

Agent's authority, revocation of, third person's knowledge of—Burden of proof; *see* *Lambardar* ... 621

Argument not to take particular defence, non-performance of, if enforceable—Lease, construction, *see* Penalty ... 95

Agreement to lease a share of a member of a joint *Mitakshara* family, if can be enforced; *see* Specific performance, suit for ... 344

Agreement to pay rent in kind after expiry of lease, if enforceable; *see* Rent, suit for ... 74

Alienation—Member of a joint *Mitakshara* family—validity, *see* Specific performance ... 344

Appeal—Award—Time for objecting, if can be extended—Limitation Act (XV of 1877), Sec. 5, Sch. II, Art. 158—Civil Procedure Code (Act XIV of 1882), Sec. 522—If an application has been made to set aside the award—Omission.

No appeal lies from a decree based on an award, though the award was assailed on the ground that there was no award valid in law.

It is not competent to the Court under section 5 of the Limitation Act, to extend the period of ten days prescribed by Art. 158, Sch. II of the said Act, for filing objections to an award.

The expression, "if no application has been made to set aside the award" in section 522 of the Code of Civil Procedure, refers to a contingency other than remission of the award.

If a reference was made with the consent of the person having no authority to act on behalf of the guardian of an infant party, the guardian *ad litem* could set aside the award within the time prescribed by Art. 158, Sch. II of the Limitation Act. **Surja Narain Jha v. Bunwari**

Jha ... 35

Appeal—Decree—Preliminary issues, decisions on—Civil Procedure Code (Act V of 1908) sec. 2 cl (2)—Decree, whether includes such a decision.

Where a number of issues was raised in a suit, and two issues were first taken up by the Court of first instance as issues in bar and were also decided in favour of the plaintiff, the other issues being left off to be proceeded with on a later date, and an appeal was preferred from the decision of these two preliminary issues.

Held, that no appeal lay inasmuch as there was no decree from which an appeal could lie. **Shib Sharan Sha v. Janaki Nath Dey** ... 78

Appeal—Order allowing decree-holder to withdraw execution proceedings;

see Decree, execution of 53

Appeal—Order refusing temporary injunction—Civil Procedure Code (Act V of 1908), O. XXXIX, R. 1 and O. XLIII, R. 1 (r).

An appeal lies under Rule 1 (r) of Order XLIII of the Code of Civil Procedure against an order refusing a temporary injunction.

An order under Rule 1 of Order XXXIX of the Code of Civil Procedure refers to any order passed under that Rule and thus includes an order refusing temporary injunction. **Hari Lal v. Paryag Ram** ... 39

Appeal—Order setting aside execution sale—Execution proceedings, fraudulent and collusive—Decree-holder purchaser—Civil Procedure Code (Act V of 1908), Sec. 47—Evidence Act (I of 1872), Sec. 44.

An application for execution of a mortgage decree was made more than three years after the decree was made absolute. After the decree absolute was made and before the said application, the judgment-debtor transferred his equity of redemption to A. The mortgagors, judgment-debtors, though served with notice, did not put in appearance nor made any objection to the application. The mortgaged property was put up to sale and purchased by the decree-holder. The sale was confirmed and possession given to the purchaser. Shortly after the delivery of possession, an application for setting aside the sale was made by A on the ground that the decree could not be executed as it was satisfied, that the execution of the decree was barred, and that the execution proceedings were irregular and had been carried on by fraud and collusion between the mortgagors judgment-debtors and the decree-holder. The Court of first instance dismissed the application for setting aside the sale in so far as it raised the question of limitation and fixed a time for the disposal of the rest of the case. On appeal the lower appellate Court set aside the decision and remanded the case:

Held, that an appeal lay to the High Court against the order of remand as the application for setting aside the sale came under section 47 of the Code of Civil Procedure.

Held also, that an appeal lay to the lower appellate Court under section 47 of the Code of Civil Procedure against an order dismissing the application on the ground of limitation by the first Court.

Held further, that it was quite competent to the applicant under the provisions of section 44 of the Evidence Act to raise the questions and adduce evidence to prove the facts stated **Ramdhan Sha v. Topi Bibi** ... 264

Appeal, if lies—Appeal against preliminary decree—Final decree, passing of; before filing of appeal—Final decree signed after filing of appeal—Civil Procedure Code (Act V of 1908), Sec. 97.

After the final decree has been made, whether or not an appeal has been preferred against the preliminary decree, it is the duty of the party aggrieved by the final decree to prefer an appeal against the final decree. An appeal therefore against the preliminary decree, after the passing but before the signing of the final decree, and without challenging by appeal the final decree, is useless and cannot be entertained.

Section 97 of the Code of Civil Procedure does not relieve the person who appeals from the preliminary decree from the necessity of appealing against the final decree nor does it provide how, if the preliminary decree is contrary to the terms of the final decree, the final decree is to be interfered with after it has been allowed to stand without any appeal being preferred against it.

Khirodamoyi Dasi v. Adhar Chandra Ghose ... 321

Appeal, if lies—Order refusing caveator to oppose—Locus standi—Probate, application for.

No appeal lies against an order refusing a caveator to oppose an application for probate on the ground that he has no *locus standi*. **Sri Proshad**

Narain Singh v. Musammat Dulhin Genda Koer ... 612.

Appeal, if lies—Suit, dismissal of—Formal decree drawn up—Civil Procedure Code (Act V of 1908), O. IX, R. 8.—Law, change of—Bengal Tenancy Act (VIII of 1885), Sec. 107—‘Decision.’

The fact of a decree being drawn up in a suit which was dismissed for default, cannot alter the nature of the order which depends upon the circumstances under which it was made.

The Court, when it has to pass an order under Order IX, Rule 8 of the Code of Civil Procedure, should not receive evidence on behalf of the defendant nor should examine the case on the merits.

The order of dismissal for default under Order IX, Rule 8 of the Code of Civil Procedure, not being a decree, cannot be challenged by way of appeal. The Code of Civil Procedure of 1908 has, in this respect, altered the pre-existing law.

The term ‘decision’ in section 107 of the Bengal Tenancy Act implies an adjudication on the merits and does not include an order of dismissal of a suit for default. **Parbati v. Tulsi Koeri** ... 128

Appeal, restoration and rehearing of—Retirement of one of the Judges—

Other Judge entertaining application for review; *see* Saltpetre, exclusive right to dig ... 151

Appeal, whole, if can be heard; *see* Issue sent down ... 181

Appeal against preliminary decree—Final decree, passing of, before filing of appeal—Appeal, effect of, *see* Appeal, if lies ... 321

Appeal against preliminary decree, maintainability of—Final decree passed pending appeal against preliminary decree; *see* Final decree, validity of ... 214

Appeal from acquittal order—Criminal Procedure Code, Sec. 417—Order passed by Magistrate of Behar and Orissa—Appeal by Government of Behar and Orissa—Appeal presented by Deputy Legal Remembrancer of Bengal, if valid; *see* Public prosecutor ... 519

Appellate Court, powers of—Civil Procedure Code (1908), sec. 107, O. X.L. Rr 23,25—Inherent power—Error, omission or irregularity; *see* Remand ... 613

Appellate Court, power of, at the final decision of appeal.

It is open to the appellate Court at the time of the final decision of the appeal to consider the whole appeal and decide according to the correct view of the matter. **Achutanand Bhattacharji v. Ram Nath Bhatta-**

charji ... 354

Application for separation of taluk.—Applications in 1799 and 1801, if can be given effect to in 1905—Fresh application, if maintainable—Order to be enforced, more than 100 years old—Limitation—Century of litigation, if kept applications pending—Board of Revenue, decision of, if final—Civil Court, jurisdiction of—Regulation I of 1801, Secs 8, 14—Regulation VIII of 1793, Sec 5—Regulation I of 1793, Sec. 10.

Upon an application having been made to the Collector of the district by the proprietor of a *taluk*, within the time prescribed under section 14 of Regulation I of 1801, for its separation from the zamindari, it was ordered, by a judgment of the *Sudder Dewani Adalat*, dated the 14th August, 1805, under the said Regulation and

Application—(Contd)

Regulation VIII of 1793 that the *taluk* should be separated from the estate, and that the Collector should deduct the *jama* of the *taluk*, from that of the zamindar. Owing to a dispute to the title of the *taluk*, a partition of the parent zamindari, a suit for the assessment of revenue in respect of char lands, certain resumption proceedings, and various other causes, the order was not carried out. And the matter was commenced by a petition dated 19th February, 1853, praying that the *taluk* might be separated on a specified *jama*. The application for separation was "rejected" by the Collector, and the "suit" was "struck off" on an objection being made by the Collector of another district acting as the Court of Wards on behalf of the zamindar, on the grounds that though the zamindar raised an objection as to limitation, separation could not take place till pending suits were decided and the lands kept *patil* were enquired into. On the 25th April, 1854, the Commissioner refused to interfere and rejected the application. The *talukdar* again applied in March 1906 to have his *taluk* separated and to have the *jama* assessed, and explained his delay in making the application by the fact that several litigations were on foot affecting the assets of the zamindar and by such other several causes. The Board of Revenue eventually ordered on the 16th April, 1909, that a separation should take place at a certain specified *sadar jama*. Upon a suit being brought by the zamindar for setting aside the order of the board:

Held, that the order of 1854 was not a final adjudication on the original application for separation, and that the proceedings commenced in 1906 was in order, and the zamindar had no cause to suppose that the *talukdar* had abandoned his rights, inasmuch as the reasons adduced by the latter for not having put forward his claims to separation before 1906 clearly showed that he did not sleep on his rights.

Held also, the civil Court has jurisdiction to interfere with the decision of the Board of Revenue in matters relating to the assessment of the *jama* of a separate *taluk* only in cases when the method followed by the Board was not according to law, and the Board acted without jurisdiction; but it has none to interfere in matters relating to details to adjudicate on which the Board certainly had jurisdiction. **Bani Hemanta Kumari Dobi v. Maharajah Jagadindra Nath Roy Bahadur** ... 526

Applications for separation of *taluk* in 1799 and 1801, if can be given effect to in 1906—Century of litigation, if kept applications pending—Limitation—Fresh application, if maintainable; *see* Application for separation of *taluk* ... 526

Apportionment case, decree in—Land Acquisition Act, Sec. 54; *see* Leave to appeal to Privy Council ... 123

Area of land purchased—Boundary; *see* Sale certificate ... 541

Articles intercepted by Custom House, if brought into Bengal; *see* Admissibility ... 567

Auctioneer, position of; *see* Decree, execution of ... 53

Award, decree on—Award invalid in Law, objection; *see* Appeal ... 35

Award, objection to, time for filing, if can be extended—Limitation Act (1877) Sec. 5, Sch. II. Art. 158; *see* Appeal ... 35

Back land—Proportion of value between back and frontage lands—Compensation; *see* Land acquisition ... 244

Ba farzand in grant, meaning of, *see* Possession, suit for ... 31

Bed of river, what is; *see* Fishery right ... 399

'Belagam,' entry of, in settlement record, effect of; *see* Presumption ... 165

Bengal Disorderly Houses Act , proceedings under—Malkelous prosecution; <i>see</i> Libel	352
Bengal Embankment Act , Sec. 54—Putni lease—Contract to pay <i>Poolbundi</i> charges by zemindar—Apportionment of charge by Collector—Contractual right, if can be enforced; <i>see</i> <i>Poolbundi</i> charges	337
Bengal Excise Act , Secs. 2(12), 46, 46(a), 52, 61—Attempting to bring opium into Bengal—Constructive possession; <i>see</i> 'Possession'	514
Bengal Tenancy Act , Sec. 22(b), before amendment—Occupancy raiyat, purchase by, of superior permanent tenure; <i>see</i> Under-raiyat, If raised to raiyat	262
Bengal Tenancy Act , Secs. 29, 43—Enhancement—Conversion of cash rent into rent in kind; <i>see</i> Rent, suit for	74
Bengal Tenancy Act , Sec. 29 Cl. (b), applicability of—Contract executed before the time of enhancement; <i>see</i> Rent, enhancement of	502
Bengal Tenancy Act , Sec. 50(2)—Payment of rent at certain rate for about 28 years—Unexplained small variation; <i>see</i> Presumption	76
Bengal Tenancy Act , Sec. 67—Contract to pay rent in monthly <i>hists</i> —Interest payable on each instalment falling due, if valid; <i>see</i> Contract	175
Bengal Tenancy Act , Sec. 85, sub-sec. (2)—Sub-lease registered in contravention of section 85, sub-sec. (2)—Effect against superior landlord; <i>see</i> Ejectment	252
Bengal Tenancy Act , Sec. 86, Sub-sec. (6)—Purchaser of a portion of holding; <i>see</i> Ejectment	257
Bengal Tenancy Act , Sec. 87, If exhaustive; <i>see</i> Non-transferable occupancy holding	193
Bengal Tenancy Act , Sec. 104 E.—Objection as to entry in Settlement Rent Roll, If sufficient notice—Civil Procedure Code (1908), Sec. 80; <i>see</i> Settlement Rent Roll, entry in, correction of	566
Bengal Tenancy Act , Sec. 104 H.—Suit against Secretary of State for India in Council—Notice—Effect of not giving notice—Civil Procedure Code (1908), Sec. 80; <i>see</i> Settlement Rent Roll, entry in, correction of	566
Bengal Tenancy Act , Sec. 106—Dispute as to entry arising under Part I of Chap. X; <i>see</i> Record of rights	187
Bengal Tenancy Act , Sec. 107—"Decision"—Dismissal of suit for default; <i>see</i> Appeal, if lies	128
Bengal Tenancy Act , Sec. 108, order under, If can be challenged by way of appeal—Bengal Tenancy Act, Sec. 109-A., Sub-sec. (2); <i>see</i> Revenue Officer's power to revise	125
Bengal Tenancy Act , Sec. 108, scope of—Class of questions—Mode in which jurisdiction is to be exercised; <i>see</i> Revenue Officer's power to revise	125
Bengal Tenancy Act , Sec. 160(c)—Betel-leaf <i>boroj</i> —Protected interest; <i>see</i> Plantation	170
Bengal Tenancy Act , Sec. 161 Cl. (a)—'Any sub-tenancy'—Under-raiyat interest; <i>see</i> Ejectment	252
Bengal Tenancy Act , Sec. 161 Cl. (a)—Encumbrance—Under-raiyat coming into land without the consent of superior landlord, auction-purchaser; <i>see</i> Ejectment	252
Bengal Tenancy Act , Sec. 167—"Date of sale"; <i>see</i> Plantation	170

Bengal Tenancy Act, Sec. 170 Sub-sec. (3) —Notice to be given to whom; <i>see</i> Notice	142
Bengal Tenancy Act, Sec. 174 —Time for application, if can be extended—Fraud of execution-creditor; <i>see</i> Sale, setting aside of	533
Bengal Tenancy Act, Sch. III. Art. 3 —Dispossession—Landlord favouring dispossession; <i>see</i> Limitation	86
Bengal Tenancy Act, Sch. III. Art. 3 —Dispossession must be by landlord; <i>see</i> Limitation	89
Bengal Tenancy Act, Sch. III. Art. 3, as amended by Act I. (B. C.) of 1907 —Dispossession before amending Act came into operation; <i>see</i> Dispossession	274
Bengal Tenancy Act, Sch. III. Art. 3 Cl. (a) —Cause of action—Expiration of term indicated in lease—Agricultural year ending at some later date; <i>see</i> Limitation	597
Bengal Tenancy Act, Sch. III, Art. 6 , applicability of—Suit to which all provisions of Act inapplicable; <i>see</i> Limitation	81
Betal-leaf bora —Protected Interest—Bengal Tenancy Act, Sec. 160 (c); <i>see</i> Plantation	170
Bid , if and when can be retracted; <i>see</i> Decree, execution of	53
Burden of proof —Jalkar, existence of—Permanently settled estate; <i>see</i> Fishery right	399
Burden of proof — <i>Joint family</i> — <i>Separation</i> . Where a family is joint and a nucleus exists, the onus is on the party setting up a case of separate property. Ganpat Marwari v. Balkund Behara	548
Burden of proof —Limitation Act (1908) Sch. I. Art. 142; <i>see</i> Declaratory suit, maintainability of	601
Burden of proof —Material alteration of Instrument—Purchaser of equity of redemption; <i>see</i> Mortgage suit	354
Burden of proof — <i>Plaintiff's title admitted</i> — <i>Defendant claiming subordinate interest derogatory to that title</i> . The plaintiff claimed a piece of land as belonging to him. The defendant did not deny the plaintiff's title, but said that he had a subordinate interest (<i>vis. raiyat</i> interest) under the plaintiff. <i>Held</i> ; that when the title of the plaintiff was not contested, it was on the defendant to prove his subordinate interest which was said to derogate from that title. Dinna Nath Das v. Ganesh Chandra Saha	544
Burden of proof —Third person's knowledge of revocation of agent's authority; <i>see</i> Lambardar	621
Calculation of Court-fee , principle of—Probate, application for—Net value of estate; <i>see</i> Court-fee	308
Calling instrument of partition a will, effect of; <i>see</i> Hindu law—Partition	57
Cash rent , conversion of, into rent in kind—Enhancement—Bengal Tenancy Act, Secs. 29, 43; <i>see</i> Rent, suit for	74
Cause of action —Retrospective effect of statute; <i>see</i> Dispossession	274
Caveator , order refusing, to oppose; <i>see</i> Appeal, if lies	612
Certificate procedure —Serving officer's return, value of—Service of notice; <i>see</i> Certificate sale	628
Certificate sale — <i>Purchaser; right of</i> — <i>Adverse possession</i> — <i>Sale of original owner's property</i> — <i>Notice, non-service of, effect of</i> — <i>Serving officer's return of service, value</i>	

Certificate sale—(Contd.)

of—Legal representative not brought on record, effect of—Public Demands Recovery Act (I. B. C. of 1895), Secs. 10, 21 Cls. (a), (b) and (c)—Civil Procedure Code (Act XIV of 1882), Sec. 310A.

A purchaser at a sale under a Public Demands Recovery Act acquires nothing beyond the right, title and interest of the persons mentioned as debtors in the certificate drawn up by the Collector.

The effect of non-service of notice required by section 10 of the Public Demands Recovery Act, upon the judgment-debtor, is that the sale held under the certificate becomes invalid and leaves it open to the original owner when dispossessed to recover possession of the property within 12 years from that date.

The return of the serving officer in the certificate procedure, stating that the notice was duly delivered to the judgment-debtor, who acknowledged receipt of the service, is *prima facie* proof of due service of notice.

The effect of the omission of the Court to bring on the record the legal representative of the judgment-debtor who has died after attachment and before sale amounts to irregularity and does not necessarily invalidate the sale, although upon appropriate proceedings taken the sale may be set aside.

Section 310A of the Code of Civil Procedure (1882) is inapplicable to a sale held under the Public Demands Recovery Act. It is open to the judgment-debtor or his representative to proceed under section 21 of the Public Demands Recovery Act. Under that section, he is bound to deposit, not merely the amounts stated in the certificate as mentioned in Clause (a) and the penalty as mentioned in Clause (b), but also the outstanding charges due to Government as mentioned in Clause (c). **Bopin Behari Bara v.**

Sasi Bhusan Datta 628

Certificate sale, setting aside of—Procedure—Public Demands Recovery Act; Secs. 21 Cls. (a), (b), (c)—Civil Procedure Code (1882), Sec. 310A;

see Certificate sale 628

Class Act, Sec. 95, if exhaustive; see Hindu widow 633

Child of tender years, examination of—Court's duty; see Evidence, admissibility of 582

Civil and criminal contempts, distinction between; see Contempt of subordinate criminal Court 452

Civil contempt, what is; see Contempt of subordinate criminal Court 452

Civil Court, when can interfere with the decision of the Board of Revenue in matters relating to assessment of *jama* of a separated *taluk*; see Application for separation of *taluk* 526

Civil Procedure Code (1882), Sec. 310 A, if applicable to sale held under Public Demands Recovery Act; see Certificate sale 628

Civil Procedure Code (1882), Sec. 317, scope of—Fictitious sale—Fictitious decree—Fictitious suit; see Fraud 616

Civil Procedure Code (1882), Sec. 441—'Guardian for the suit', see Decree, setting aside of 384

Civil Procedure Code (1882), Sec. 443—Minor described as under the guardianship of certain person—No order by Court—Minor unrepresented; see Decree, setting aside of 384

Civil Procedure Code (1882), Sec. 462—Compromise on behalf of minor—Procedure, see Decree, setting aside of 384

- Civil Procedure Code** (1882), Sec. 462—Father as guardian *ad litem* of his minor son—Joint Hindu family—Partition, suit for—Father's power to compromise; *see* Hindu law—Suit for partition ... 730
- Civil Procedure Code** (1882), Sec. 522—"If no application has been made to set aside the award"—Contingency—Remission of award, *see* Appeal ... 35
- Civil Procedure Code** (1908), Sec. 2 CL (2)—Decree—Issues in bar, decisions on; *see* Appeal ... 78
- Civil Procedure Code** (1908), Sec. 47—Remand order—Application for setting aside of sale; *see* Appeal ... 264
- Civil Procedure Code** (1908), Sec. 73—Execution Court, if can hold summary enquiry as to fraudulent character of decree; *see* Rateable distribution ... 646
- Civil Procedure Code** (1908), Section 73, scope of—Sale in execution of a decree—Decretal amount, deposit of, by judgment-debtor, under Order XXI, Rule 89—Rateable distribution, application for, by other creditors.
- The Court has no power under section 73 of the Code of Civil Procedure to distribute rateably among several creditors of a judgment-debtor, the money deposited by the latter under Order XXI, Rule 89 of the Code for setting aside a sale held in execution of a decree of one of the creditors. *Harai Saha v. Faislar Rahman* ... 144
- Civil Procedure Code** (1908), Sec. 80—Objection as to entry in Settlement Rent Roll, if sufficient notice; *see* Settlement Rent Roll, entry in, correction of ... 566
- Civil Procedure Code** (1908), Sec. 97—Preliminary decree, appeal against—Final decree, passing of, before filing of appeal—Appeal, effect of; *see* Appeal, if lies ... 321
- Civil Procedure Code** (1908), Sec. 98—Point of law, *see* Third Judge, duty of ... 384
- Civil Procedure Code** (1908), Sec. 99—Decision as regards misjoinder in favour of plaintiff, if can be questioned in appeal; *see* Misjoinder ... 260
- Civil Procedure Code** (1908), Sec. 99—Error of law—Error not affecting merits of case—Irregularity—Revision, *see* Remand ... 613
- Civil Procedure Code** (1908), Sec. 102—Account, suit for; *see* Second appeal ... 260
- Civil Procedure Code** (1908), Sec. 107, O.XLI Rr 23, 25—Appellate Court, powers of—Inherent power—Error, omission or irregularity; *see* Remand ... 613
- Civil Procedure Code** (1908), Sec. 109—Order deciding suit not barred under Sec. 91 of the Chota Nagpur Tenancy Act and remanding the case for retrial—Interlocutory order, *see* Leave to appeal to Privy Council ... 124
- Civil Procedure Code** (1908), Sec. 115—Acting with material irregularity in exercise of jurisdiction—Decision based on evidence not taken in accordance with law; *see* Rateable distribution ... 646
- Civil Procedure Code** (1908), Sec. 115—Exercising jurisdiction not vested by law—Execution sale—Court's duty; *see* Sale, setting aside of ... 533
- Civil Procedure Code** (1908), Sec. 115—Revision by High Court of Small Cause Court decrees—Findings of fact by original Court, if can be reviewed by the Full Court of the Small Cause Court.
- Where an application was made to the Full Court of the Small Cause Court for a new trial on a question of fact.

Civil Procedure Code—(Contd.)

- Held*, on revision by the High Court, that the Full Court is not precluded from reviewing the findings of fact of the original Court. **Shamul Kishore Addy v. Rai Sahab Girindra Nath Mukhopadhyaya** ... 594
- Civil Procedure Code** (1908), Sec. 151—Court's inherent power to rectify mistake inadvertently committed; *see* Sult, maintainability of ... 9
- Civil Procedure Code** (1908), O. IX. R. 3, applicability of—Dismissal for default—Plaintiff, death of—Substitution, application for; *see* Sult, maintainability of ... 129
- Civil Procedure Code** (1908), O. XXI. R. 17 Sub-Rule (a)—Application to file a list of immovable properties—Permission to file—No time fixed by Court—Petition for execution, not amended within period of limitation—Execution proceeding, if barred; *see* Limitation ... 538
- Civil Procedure Code** (1908), O. XXI. R. 101—Claim by representative of a member of joint family other than judgment-debtor—Claim, allowing of, effect of; *see* Claim to be restored to possession ... 138
- Civil Procedure Code** (1908), O. XXII. R. 3, principle of, if applicable to revision proceedings; *see* Jurisdiction ... 141
- Civil Procedure Code** (1908), O. XXXIX. R. 1—Order refusing temporary injunction; *see* Appeal ... 39
- Civil Procedure Code** (1908), O. XLI R. 4—Parties to appeal.

The plaintiffs along with the first defendant and two other persons who were not parties to the litigation were *gautias* of the village which comprised the disputed land. The first defendant was the lambardar. The land was originally in the occupation of a tenant who abandoned it. As soon as the tenant vacated the land, the plaintiffs served notice upon the first defendant in which they requested him either not to lease their share of the land to any tenant, or to lease the same to the plaintiffs themselves. Notwithstanding this notice, the first defendant settled the land with the remaining defendants. The plaintiffs consequently sought a declaration that the first defendant was not competent to grant a valid lease to the other defendants and that they were entitled to joint possession of the land. The Court of first instance held in the first place that the lambardar defendant was not competent to grant a lease of the land to the other defendants; and in the second place, that if the lambardar had authority to grant such a lease, that authority had been validly terminated.

Held, that under the circumstances, it was open to the first defendant to prefer an appeal against the whole decree without joining the other defendants as respondents and to obtain thereupon a reversal of that decree in favour and for the benefit of all the defendants under Order XLI, Rule 4 of the Code of Civil Procedure; but it was obligatory upon the plaintiffs in second appeal to join as parties respondents not merely the first defendant but also the tenant defendant.

Held also, that the first defendant had no authority to settle the land and his authority had been revoked by the notice given to him. **Dasarath Patel v. Brojo Mohan Gauntia** ... 621

- Claim** by representative of a member of joint family other than judgment-debtor—Claim, allowing of, effect of—**Civil Procedure Code**, O. XXI. R. 101; *see* Claim to be restored to possession ... 138
- Claim to be restored to possession**—Joint family, member of; purchaser from—Execution purchaser—**Civil Procedure Code** (Act V of 1908), O. XXI R. 101.

Claim—(Contd.)

The terms of Rule 101, Order XXI of the Code of Civil Procedure are comprehensive enough to cover a case of a claim by a representative of a member of a joint family other than the judgment-debtor. The effect of an order in favour of the claimant is to restore him to joint possession with the execution-purchaser. **Badha Gobind Misra v. Raghunath Misra** ... 138

Collateral offence, evidence of, if can be received as substantive evidence of offence on trial—Evidence Act, Sec. 14; *see* Evidence, admissibility of ... 578

Collection papers—Admissibility in evidence—Rent Collector dead; *see* Hindu widow ... 633

Collector's jurisdiction to sell estate not liable to sale for arrears of revenue; *see* Revenue sale ... 505

Compensation—Back land—Proportion of value between back and frontage lands; *see* Land acquisition ... 244

Compromise—Parties, if bound—*Compromise decrees*.

A compromise is a binding agreement between the parties, and none the less binding because it is followed by a decree. **Keshab panda v. Bhobani panda** ... 187

Compromise, father's power to—Father as guardian *ad litem* of his minor son—Joint Hindu family—Partition, suit for—Civil Procedure Code (1882), Sec. 462; *see* Hindu Law—Suit for partition ... 1

Compromise decree, if binds parties; *see* Compromise ... 187

Compromise on behalf of minor—Procedure—Civil Procedure Code (1882), Sec. 462; *see* Decree, setting aside of ... 384

Compromise on behalf of minor—Procedure, necessary, not followed—Effect of; *see* Decree, setting aside of ... 384

Conjectures; *see* Judicial decision ... 220

Consent decrees, propriety of, if can be examined by revenue officer specially empowered; *see* Revenue officer's power to revise ... 125

Consideration—Mortgage bond—Settlement of dispute—Promise to pay time-barred debt—Contract Act (IX of 1872), Sec. 25 sub-Sec. (3):

A mortgage bond executed in settlement of a substantial dispute between the parties, *vis.*, whether an application for execution of decree for money was or was not barred by limitation, is executed for consideration. Even if the execution of the said decree was barred at the time of the settlement and the mortgagor was not aware of it, the mortgage is valid under sub-section (3) of section 25 of the Indian Contract Act. **Mati Sheikh v. Balkantha Nath Kar** ... 269

Constructive possession—Criminal proceedings; *see* "Possession" ... 314

Contempt against subordinate officers of Court—Contempt of authority of Court, *see* Contempt of subordinate criminal Court ... 452

Contempt of authority of Court—Contempt against subordinate officers of Court; *see* Contempt of subordinate criminal Court ... 452

Contempt of Court, what is; *see* Contempt of subordinate criminal Court ... 452

Contempt of Court by publication of improper character—Articles; *see* Contempt of subordinate criminal Court ... 452

Contempt of Court in respect of printing and publication of articles in a newspaper—Interference with due course and administration of justice—Criminal offence, *see* Contempt of subordinate criminal Court ... 452

Contempt of subordinate criminal Court—*High Court, jurisdiction of—Printing and publication of articles in newspaper—Legal evidence—Statement on information and belief—Notice of motion, when can be amended—Sadar Nizammat Adalat—Court of Record—Civil and criminal contempts, distinction between—Criminal Procedure Code (Act V of 1898), Sec. 196—Court, when can make order for attachment for contempt of Court—Contempt of Court by publication—Course to be pursued—‘Positive evidence’.*

A contempt of Court in respect of printing and publication of articles in a newspaper tending or calculating to interfere with the due course and administration of justice, is a criminal offence and no person can be punished for it, unless that offence be proved by legal evidence. A statement resting on information and belief is not legal evidence in such a case.

A Judge will be very slow to give leave to amend the notice of motion, if it were in any way likely that by so doing an injustice would be done to any party.

Neither the Supreme Court nor the Sudder Dewany Adalat had authority to punish a contempt of a Court not subordinate to its authority.

The Sudder Nizammat Adalat was not a King's Court but the Company's Court, and was not a Court of Record, though it had power of Superintendence over subordinate criminal Courts.

The Sudder Nizammat Adalat, when it was abolished, had no jurisdiction to punish for a contempt of a subordinate criminal Court; and its authority to punish for contempt of itself was of a somewhat restricted character.

The High Court, by the express terms of the Letters patent, is a Court of Record and every Court of Record has the power of summarily punishing for contempt of its authority.

The High Court has a right to treat as a contempt any act committed within the local limits of High Court's Original Jurisdiction that may affect its trial on appeal, and in particular any act that may tend either to taint or impair that evidence or to cause evidence that would otherwise be forthcoming.

Ordinarily one Court cannot punish a contempt against another Court or Judge. This is based on the doctrine that the offence is substantially criminal and the power to punish it is vested alone in the Court whose judicial authority is challenged. The position, however, is different where the contempt is regarded as contempt of the authority of the Court by which the officer was appointed and may be punished.

The High Court as a Court of Record has no authority to punish for contempt of the subordinate criminal Court, merely because it exercises power of superintendence over that Court or because that Court is subject to its appellate and revisional jurisdiction.

The Court will not make an order for the attachment for contempt of Court, unless it is satisfied beyond dispute that the order is needed peremptorily in the interests of the administration of justice.

The usual rule, when a motion for contempt is dismissed, is that the respondent's costs should be paid.

Per Jenkins C. J. A man in a criminal proceeding need not deny that which is not legally proved against him.

Obiter—In a civil proceeding, a statement on information and belief is not admissible except on an interlocutory application, and then the grounds of such belief must be stated.

‘Positive evidence’ has a recognised and distinct signification and means evidence which goes expressly to the very point in question; and that which, if believed, proves

Contempt of subordinate criminal Court—(Contd.)

the point without aid from inference or reasoning as the testimony of an eye-witness to an occurrence as distinguished from indirect or circumstantial evidence.

The true implication of section 196 of the Criminal Procedure Code is, that the judgment of the Local Government should be specially directed to the particular sections or Chapter VI of the Indian Penal Code in respect of which proceedings are to be taken, and that the order or authority should be preceded by, and be the result of a deliberate determination that proceedings should be taken.

Per Stephen J.—Any act which tends to impede the course of justice is a contempt, if there is a well-proved probability of such being its result.

The law of contempt is applicable in India for the purpose of protecting witnesses, as it is applied in England to the protection of juries.

Contempt is to be treated as a crime, though it may not be one in India as it is in England.

Per Mookerjee J.—It is a matter of vital importance for the party against whom an order is sought to know, the person or persons at whose instance the application is made.

A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a civil contempt the proceeding for its punishment is at the instance of the party interested and is civil in its character; in the case of a criminal contempt, the proceeding is for punishment of an act committed against the majesty of the law, and as the primary purpose of the punishment is the vindication of the public authority, the proceedings conform as nearly as possible to proceedings in criminal cases. The dividing line between the acts constituting criminal and those constituting civil contempts may sometimes become indistinct in those cases where the two gradually merge into each other.

The course to be pursued in cases of contempt of Court by publication of an improper character made long before the proceedings have been brought to the Court, is to read the articles as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary.

In the matter of the Amrita Bazar Patrika

452

Contract—Garden and *bastu* lands—Garden converted into *bastu* land—

Tenant, liability of; *see* Enhanced rent, claim for ... 324

Contract—Landlord and tenant—Bengal Tenancy Act (VIII of 1885), as amended by Act I of 1907, B. C. Secs. 53, 67, and 178, sub-sec. (3), cl. (h)—Contract to pay rent in monthly *bists*, whether valid—Interest on each *bist* from the date falls due, how far valid.

A contract between a landlord and a tenant for payment of rent in monthly *bists* or instalments is valid, and is in accord with the provisions of the Bengal Tenancy Act; but a stipulation for payment of interest on each instalment from the time when it falls due, being in excess of that which can be permitted under the law (that is, twelve and a half per cent per annum), is illegal and cannot be enforced, inasmuch as the landlord is only entitled to the interest secured to him by section 67 of the Act. **Manohar Mukherjee v. Fareesh Chandra Mukherjee**

175

Contract, if can be enforced—Contract to pay *poolbundi* charges by zemindar—Embankment Act at the time of contract, repeal of; *see* *Poolbundi* charges

337

Contract subject to qualification—Similar contracts with others, if admissible; <i>see</i> <i>Jagir</i>	277
Contract to pay interest on kist—Monthly kists; <i>see</i> <i>Contract</i>	175
Contract to pay poolbundi charges by zemindar—Putni lease—Apportionment of charge by Collector—Bengal Embankment Act, Sec. 54—Contractual right, if can be enforced; <i>see</i> <i>Poolbundi</i> charges	337
Contract Act , Sec. 23—Contract, if contrary to policy of law—Contract to pay poolbundi charges by Zemindar; <i>see</i> <i>Poolbundi</i> charges	337
Contract Act , Sec. 25 Cl. (3)—Knowledge of debt barred, if necessary; <i>see</i> Promise to pay barred debt	329
Contract Act , Sec. 25, Sub-sec. (3)—Promise to pay time-barred debt—Debtor not aware of debt being time-barred; <i>see</i> <i>Consideration</i>	269
Contract Act , Sec. 62—Acknowledgment of obligation by third person in favour of plaintiff; <i>see</i> <i>Novation</i>	603
Contract Act , Secs. 203, 204, 208—Revocation of agent's authority—Third person; <i>see</i> <i>Lambarder</i>	621
Conviction —Doubt as to Innocence—Disregard of forms of legal process; <i>see</i> <i>Criminal proceedings</i>	365
Conviction —Doubt as to Innocence—Violation of principles of natural justice; <i>see</i> <i>Criminal proceedings</i>	365
Conviction —Inadmissible evidence, admission of—Grave prejudice; <i>see</i> <i>Criminal proceedings</i>	365
Co-Sharer landlord, decree obtained by, for his share of rent—Suit for rent in respect of several holdings—Execution, application for—Bengal Tenancy Act, Sch III, Art 6; <i>see</i> <i>Limitation</i>	81
Co-Sharers in joint estate, relation between, as to payment of share of Government revenue—Mutual confidence; <i>see</i> <i>Fraud</i>	97
Co-Sharer's wilful default in paying Government revenue—Revenue sale; <i>see</i> <i>Fraud</i>	97
Cost —Dismissal of motion for contempt; <i>see</i> <i>Contempt of subordinate criminal Court</i>	452
Costs —Pleader's fee, assessment of—General Rules and Circular Orders of the High Court, Appellate side, Vol I, Chap. VI, Rules 36A, 42A. Chap. X; Rule 26.—Probate and Administration Act, Sec. 83; <i>see</i> <i>Probate proceeding</i>	643
Costs , when the Crown is party—Privy Council, jurisdiction of; <i>see</i> <i>Criminal proceedings</i>	365
Court , if can accept part of written statement. A Court can accept a portion of the statement of the defendant and reject another portion. Pran Krishna Saha v. Mukta Sundari Dasgupta	193
Court , if can re-open question of court-fee after decree; <i>see</i> <i>Court-fee</i> , amount deposited for, refund of	133
Court , when can make order for attachment for contempt of Court; <i>see</i> <i>Contempt of subordinate criminal Court</i>	452
Court-fee —Appeal from order under section 90 of the Transfer of Property Act; <i>see</i> <i>Court-fee</i> , amount deposited for, refund of	133
Court-fee —Probate, application for—Court-fee, assessment of—Court-Fees Act (VII of 1870), Sch. I Art. II and Sch. III—Court-Fees Act, interpretation of. The Court-fee payable in respect of the estate left by the deceased is to be calculated upon the net value of the estate obtained by deduction of the amount of the debts from the gross value of the estate.	

Court-fee—(Contd.)

The true mode of interpretation of a statute like the Court-Fees Act, which has been repeatedly amended, is not to consider individual sections, but to take them as a whole and to give effect to the legislative intent upon a particular matter. **In the goods of Harriett Tevlot Kerr** ... 308

Court-fee, amount deposited for, refund of—Ad valorem Court-fee—Transfer of Property Act (IV of 1884), Secs. 89, 90—Decree, nature of—Court-Fees Act (VII of 1870), Sec. 4—Decree on appeal, effect of—Memorandum of appeal, court-fee in, insufficient—Court, if can re-open question of court-fee after decree.

It is not competent for a Court at the time of passing a decree under section 89 of the Transfer of Property Act to declare the personal liability of the mortgagor.

A decree under section 90 of the Transfer of Property Act can be passed only after it has been ascertained that the net proceeds of the sale of the mortgaged properties are insufficient to pay the amount due on the decree.

An appeal from an order under section 90 of the Transfer of Property Act is an appeal from a decree, and in such appeal *ad valorem* Court-fees must be paid on the memorandum of appeal.

Section 4 of the Court-fees Act is imperative in its terms and makes it impossible for the Court to entertain a memorandum of appeal upon which a proper amount of Court-fee has not been paid.

If the legal advisers of either party with knowledge of the previous order have omitted to bring the question of the sufficiency of the Court-fee on the memorandum of appeal to the notice of the Court, and the Court has passed a decree, it is obligatory upon the Court, when the question is raised upon the application by the appellant to obtain a refund of the sum in deposit by order of Court, to consider whether the memorandum of appeal was or was not properly stamped. **Lakhi Narain Jagdeb v. Chowdhury Kirtibaz Das** ... 133

Court fee, principle of calculation of—Probate, application for—Net value of estate; see Court-fee ... 308

Court-fees Act, interpretation of; see Court-fee ... 308

Court-fees Act, Sec. 4—Proper Court-fee not paid on memo of appeal; see Court-fees amount deposited for, refund of ... 133

Court-fees Act, Sch. I, Art. II. and Sch. III—Probate, application for—Net value of estate; see Court-fee ... 308

Court of Record—High Court; see Contempt of subordinate criminal Court ... 452

Court's duty—Child of tender years, examination of; see Evidence, admissibility of ... 582

Court's duty—Execution sale—Civil Procedure Code (1908), Sec. 115—Exercising jurisdiction not vested by law; see Sale, setting aside of ... 533

Court's duty—Fishery right—Waters, if part of river; see Fishery right ... 399

Court's duty when passing order under O. IX. R. 8 of the Code of Civil Procedure; see Appeal, if lies ... 138

Court's inherent power to rectify mistake inadvertently committed; see Sult, maintainability of ... 9

Court's power—Receiver appointed under Provincial Insolvency Act, acting in excess of authority—Stranger, remedy of; see Insolvency proceeding ... 359

Court's power to appoint Receiver pending hearing of partition suit—No exclusive possession by any party; see Receiver ... 638

- Criminal appeal**, admission of, restrictive order for, if valid, *see* Criminal Procedure Code, Sec. 422 ... 582
- Criminal contempt**—Procedure to be followed, *see* Contempt of subordinate criminal Court ... 452
- Criminal contempt**, what is; *see* Contempt of subordinate criminal Court ... 452
- Criminal offence**—Contempt of Court in respect of printing and publication of articles in a newspaper—Interference with due course and administration of justice, *see* Contempt of subordinate criminal Court ... 452
- Criminal Procedure Code**, Sec. 6, Implication of; *see* Contempt of subordinate criminal Court ... 452
- Criminal Procedure Code** 1898, Secs. 236, 237—*Offence committed*.
The application of section 237 of the Code of Criminal Procedure is restricted to the case mentioned in section 236. Section 236 applies only to a case in which there is a single act or a series of acts of such a nature that it is doubtful which of several offences is constituted by the criminal act or acts. Hence when there is no doubt as to the offence committed, neither section 235 nor section 237 can apply. **Akram Ali v. Emperor** ... 574
- Criminal Procedure Code**, Sec. 237—No doubt as to offence committed; *see* Criminal Procedure Code, Secs. 236, 237 ... 574
- Criminal Procedure Code**, Sec. 307 Cl. (c)—“Opinion of the Sessions Judge and of the jury”; *see* Reference, validity of ... 522
- Criminal Procedure Code**, Sec. 47—Appeal from acquittal order by Government of Behar and Orissa—Appeal presented by Deputy Legal Remembrancer of Bengal, if valid; *see* Public prosecutor ... 519
- Criminal Procedure Code**, Sec. 422—*Restrictive order for admission of appeal, if valid*.
A restrictive order for admission of appeal, which is not contemplated by section 422 of the Code of Criminal Procedure, is *ultra vires*. **Hafar Sheikh v. Emperor** ... 582
- Criminal Procedure Code**, Sec. 526—Security for keeping peace—Magistrate acting as private arbitrator—Magistrate, if can try; *see* Transfer of case ... 150
- Criminal proceeding**—Fact not legally proved—Person, if to deny; *see* Contempt of subordinate criminal Court ... 452
- Criminal proceedings**—*Grave and substantial injustice*—*Reliable evidence, want of*—*Inadmissible evidence, reception of*—*Evidence of motive*—*Statement made in the absence of an accused, when admissible*—*Informer's evidence*—*Confession*—*Non-production of evidence as to the circumstances of an informer's arrest and confession, effect of*—*Rejection of a story designedly made to fit into another, effect of*—*Statements, which are inventions, evidentiary value of*—*Costs, when the Crown is party*—*Privy Council, jurisdiction of*.
If in an appeal against a conviction their Lordships came to the conclusion that in the prosecution of the appellant “by some disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, some substantial and grave injustice has been done,” then whatever doubts they may have of the appellant's innocence, or whatever suspicion they may entertain of his guilt, or however great may be their reluctance to interfere with, or overrule the decisions of the Indian Courts in criminal matters, they are bound humbly to advise His Majesty that the conviction should not be allowed to stand.
Where the appellant was convicted of abetment of murder and sentenced to

Criminal proceedings—(Contd.)

death and it appeared that a vast body of wholly inadmissible evidence, hearsay and other, had been admitted; that when admitted it has been used to the grave prejudice of the appellant, and that at the end of the hearing before the trial Judge there did not exist any reliable evidence upon which a capital conviction could be safely or justly based:

Held, that the conviction and sentence should not be allowed to stand.

Held also, that by admitting a piece of inadmissible evidence and using it to prove the appellant's consciousness of guilt and his desire to destroy the evidence of his crime, a grave and substantial injustice was done to him.

However strong and convincing the evidence of an adequate motive may be, that evidence can never counteract the harm done by the reception of inadmissible evidence, or the injustice its use may lead to, nor by itself supply the want of all reliable evidence, direct or circumstantial of the commission of the crime with which an accused person may be charged.

A statement made in the absence of the accused is not admissible without first adducing evidence to show that the accused had himself instructed the person, making the statement, to make it, or directly or indirectly authorised any one to make it for him or on his behalf, or that the accused knew anything about it.

An informer, who was arrested by the police, made a confession before a Magistrate implicating the appellant, other accused persons and himself. At the trial, when he was produced as a witness for the prosecution, he deposed that he was asked by the police to make the confession and that the story told by him in that confession was false. But the next day he withdrew his evidence of the preceding day and gave evidence in terms of his confession:

Held, that everything connected, with the confession was, as far as the appellant was concerned, was done in the dark, that it was not without reason that the appellant's Counsel bitterly complained of the great injustice done to the appellant inasmuch as the officer who arrested the informer was not produced, nor was any witness produced by whose cross-examination the defence could have had an opportunity of ascertaining at whose instance he was arrested, or how his confession came to be made, or what inducements, if any, were held out to him to make it, and that the informer's evidence should be taken as struck out of the record, but though struck out, it must reflect back upon the evidence of another witness, whose story was designedly made to harmonize and fit into the informer's story.

When two stories told by two witnesses are designedly made to harmonize and fit into each other, the fact that one of them, is rejected as incredible must necessarily affect the reliability of the other.

When forgetfulness on the part of a witness is out of the question and no confusion produced by the most skilful cross-examination can account for the statements which must either be the witness's own inventions or the inventions of others repeated by him with knowledge of their character, the witness's evidence is wholly unreliable and should be completely disregarded.

When the Crown is a party to an appeal, the general rule is that the Crown neither pays nor receives costs, unless the case is governed by some local statute or there are exceptional circumstances justifying a departure from the general rule. **Vaithinatha Pillai v The King-Emperor** ...

Criminal revision, order in—Criminal Procedure Code, Sec. 118; see

Leave to appeal to Privy Council

365

119

Custom—Essentials—Proof necessary—Law, question of.

If a party rely upon a special custom of a family, to take the succession out of the ordinary Hindu Law, such custom must be proved to be ancient and continuous.

The custom must be very satisfactorily proved by evidence of particular instances, instances so numerous as to justify the Court in finding in favour of the custom.

Whether certain events did or did not happen, is a question of fact; but whether the facts so found do or do not establish a custom, is a question of law to be determined by the High Court in second appeal. **Durga Charan**

Mahto v. Baghunath Mahto ... 559

Custom—Limited nature of evidence—Precedent; see Hindu Law—Adoption ... 70

Damages, suit for—Maintainability—Obstruction in erection of Kutchery—Loss of goods—Negligence.

In consequence of encroachment of the river Ganges, the land on which the plaintiffs' kutchery stood was threatened with diluvion. The kutchery contained grain and other goods. When the river after some two years came very near the kutchery, the plaintiffs attempted to erect another kutchery on another land belonging to them. The defendants however obstructed them in the construction of the new kutchery. The plaintiffs thereupon brought a suit for damages for loss of their goods but not for trespass.

Held, that the suit was not maintainable, as the loss was attributable not to the defendants but to the wanton negligence of the plaintiffs. **Tribeni**

Prosad Singh v. Sheikh Basirul Moah ... 327

Date of sale—Bengal Tenancy Act, Sec. 167; see Plantation ... 170

Debt incurred for litigation, immoral or illegal; see Mortgage ... 43

Debutter—Image, consideration of, after destruction of old—Shebait, if to apply the proceeds—Shebait, refusal of, to apply proceeds, effect of; see Ejectment, suit for ... 347

'Decision'—Bengal Tenancy Act, Sec. 107—Dismissal for default; see Appeal, if lies ... 128

Decision based on evidence not taken in accordance with law—Acting, with material irregularity in exercise of jurisdiction—Revision; see Rateable distribution ... 646

Decision of third Judge on reference—Letters Patent (1865) Cl. 41; see Leave to appeal to Privy Council ... 121

Declaratory suit—Suit for declaration of nullity of decree—Suit brought several years after attainment of majority—Plaintiff, though minor, sued as major in the previous suit; see Decree, if void ... 18

Declaratory suit, maintainability of—Suit for recovery of possession, bar of—Limitation Act (IX of 1908), Sec. 28, Sch. I, Art. 142—Dispossession, allegation of—Burden of proof.

When there is a bar to the suit for recovery of possession, there is an extinguishment of title and no declaration of title can be made in plaintiffs' favour.

When the plaintiff alleges dispossession, he must show that he has brought his suit within 12 years from this dispossession. When he fails to do that, his case falls within section 28 of the Limitation Act. **Bishambhar**

Satbhaya v. Nadar Chand Mandal Satbhaya ... 601

Decree—Civil Procedure Code (1908), Sec. 2 Cl. (12)—Issues in bar, decisions on; see Appeal ... 78

Decree, execution of—Application to file a list of immovable properties—Civil Procedure Code, O. XXI. R. 17 Sub-R. (2)—Permission to file—No

Decree—(Contd.)

time fixed by Court—Petition for execution, not amended within period of limitation—Execution proceeding, if barred; *see* Limitation ... 538

Decree, execution of—Decree against alleged adopted minor son—Adoption proved invalid—Guardian-ad-litem real representative—Guardian-ad-litem, if can be proceeded against.

In a decree obtained in a claim for mesne profits against an alleged adopted minor son as the representative of the wrong-doer, who was found in another suit to be not validly adopted, the decree-holder could not proceed against the judgment-debtor, as he had not received any assets of the wrong-doer; nor could he ask the Court to substitute the name of the real representative, who was appointed *guardian-ad-litem*, in the decree; nor could he proceed against the *guardian-ad-litem*. The remedy of the decree-holder was by way of a suit against the legal representative. **Ashi Bhusan Dasi v. Polaram Mandal** ... 362

Decree, execution of—Decree holder's right to withdraw application—Order allowing withdrawal of execution proceedings—Appeal—Bid, if and when can be retracted—Decree-holder's clerk, bid by, on behalf of decree-holder—Decree-holder, if can withdraw from bid.

A decree-holder cannot, as a matter of right, discontinue the execution proceedings at any stage at his option.

An order allowing the decree-holder to withdraw the execution proceedings is not appealable.

A bid is a mere offer and can be retracted by the bidder at any time before the auctioneer announces the completion of the sale by the fall of the hammer or other customary method.

An auctioneer is an agent of the owner of the property and till he accepts the bid, the matter is open and the bidder is at liberty to withdraw his bid.

A decree-holder can withdraw the bid offered by his clerk with his assent and on his behalf, before it has been accepted by the Court. **Kenaram**

Bakshi v. Kailas Chandra Dutt ... 53

Decree, if void—Minor sued as major—Minor not represented by guardian ad litem.

A decree passed against a person who was really a minor but who was described in the suit as if he was of age, was a nullity so far as he was concerned, and in a suit instituted several years after the attainment of majority, for a declaration of the nullity of the decree and proceedings thereunder, no question of limitation would arise.

So long as a guardian *ad litem* is not appointed, a minor cannot be said to be party to a suit in the proper sense of the term. **Purno**

Chandra Kunwar v. Maharajadhiraj Bejoy Chand Mahatab Bahadur ... 18

Decree, reversal of—Error of law—Error not affecting merits of case—

Irregularity—Civil Procedure Code (1908), Secs. 99, 115, *see* Remand ... 613

Decree, setting aside of—Minor unrepresented—Compromise on behalf of a minor in a suit—Code of Civil Procedure, (Act XIV of 1882), Secs. 441, 443 and 462—Guardian for suit—Specific Relief Act (I of 1877), Sec. 42.

In cases to which section 462 of the Code of Civil Procedure, 1882, applies it is not sufficient proof that the exigencies of the section were complied with to show that minor was described in the title to the suit as a minor "under the guardianship of a person named" and that the terms of the compromise were before the Court, but there ought

Decree—(Contd.)

to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown, by an order on petition or in some way not open to doubt, that the leave of the Court was obtained. In the absence of evidence to that effect the compromise and the decree made in pursuance thereof must be declared not binding on the minor, who should be remitted to his original position.

Where two minor defendants were described in the title of the suit as minors 'under the guardianship of H,' but no order was made by the Court as required by section 443 of the Code of Civil Procedure, 1882, appointing the said H guardian for the suit for the said minors :

Held, that the said minors were not in law represented in the said suit.

The words 'guardian for the suit' in section 441 of the Code of Civil Procedure, 1882 mean the guardian for the suit for a minor appointed by the Court as required by section 443 thereof.

Section 42 of the Specific Relief Act does not apply to a suit instituted by the plaintiffs seeking a declaration that a decree made in a previous suit, where they were minor, was not binding on them and claiming to be restored to the position which they held prior to the date of the decree. **Kunwar Partab Singh v.**

Bhabuti Singh ... 384

Decree against alleged minor adopted son—Minor represented in suit by adoptive mother—Adoptive mother representative, if adoption invalid—Adoption, invalid—Suit against adopted son as representative of wrong-doer—Decree-holder's remedy, *see* Decree, execution of ... 362

Decree against minor—Minor sued as Major; *see* Decree, if void ... 18

Decree for share of rent, execution of—Co-sharer landlord—Suit for rent in respect of several holdings—Bengal Tenancy Act, Sch. III, Art 6; *see* Limitation ... 81

Decree in apportionment case—Land Acquisition Act, Sec. 54; *see* Leave to appeal to Privy Council ... 123

Decree on award—Award invalid in Law, objection; *see* Appeal ... 35

Decree-holder, if, as a matter of right, can discontinue execution of decree; *see* Decree, execution of ... 53

Decree-holder, if and when can withdraw bid offered by his clerk; *see* Decree, execution of ... 53

Decree holder's clerk, bid by, on behalf of decree-holder, if and when can be withdrawn by decree-holder; *see* Decree, execution of ... 53

Decree holder's remedy—Suit against minor adopted son as legal representative of wrong-doer—Minor represented in suit by adoptive mother—Adoptive mother representative, if adoption invalid—Adoption, invalid; *see* Decree, execution of ... 362

Decree holder's right to withdraw application for execution, *see* Decree, execution of ... 53

Deed for valuable consideration, in whose favour to be construed, *see* Mortgage ... 48

Defaulter, if to show erroneous debit—Share in arrear, *see* Revenue sale ... 505

Defaulting tenure, purchase by land-lord, in execution of his money decree, subject to rent charge, effect of; *see* Rent decree, execution of ... 29

Defaulting co-owner purchaser—Revenue sale caused by defaulting co-owner—Defaulting co-owner, if trustee, <i>see</i> Fraud	97
Denial of land-lord's title—Forfeiture—Limitation Act, Sch. II. Arts. 143, 144; <i>see</i> Limitation	553
Dismissal for default—Plaintiff, death of—Substitution, application for—Civil Procedure Code, O IX R. 3, applicability of; <i>see</i> Suit, maintainability of	9

Dismissal for default, order of, if decree; <i>see</i> Appeal, if lies	128
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Dispossession —Bengal Tenancy Act (VIII of 1885 as amended by Act I. B. C. of 1907), Sch. III, Art 3—Cause of action, accrual of before amendment—Adverse possession—Limitation Act (IX of 1908) Sch. I. Art. 142—Ideal possession.	
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The law of limitation applicable to a suit is *prima facie* the law in force at the date of the institution of the suit. But there may be circumstances connected with a new statute which furnish an indication that the Legislature did not intend to affect retrospectively existing causes of action; one of these circumstances is that the new law was brought into immediate operation without any opportunity afforded to litigants to enforce their rights under the old law.

Article 3, Schedule III of the Bengal Tenancy Act, as amended by Act I (B. C.) of 1907, does not apply to cases where the dispossession took place before the amending Act came into operation.

As against the rightful owner, the possession of a trespasser is available only when there is actual possession of the disputed land or overt or physical act of ownership done upon it. The true owner is not affected by ideal possession of the land or possession which exists only in the imagination of the parties. **Buddhu Koer v. Hafiz Hussain** ... 274

Dispossession , nature of—Landlord dispossessing tenant from whole or part of the holding; <i>see</i> Rent, suspension of	509
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Dispossession by person other than landlord—Landlord favouring dispossession—Bengal Tenancy Act Sch. III. Art. 3; <i>see</i> Limitation	86
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Dispute as to entry arising under Part I of Chap X—Bengal Tenancy Act, Sec. 106; <i>see</i> Record of rights	187
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Dissolution , presumption of—Evidence—Accounts—Subsequent conduct of parties—Limitation Act (1877) Sch II. Art 106; <i>see</i> Partnership business, claim for a share of	13
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Document , printing of—Exclusion—Privy Council Appeal—Irrelevant to subject-matter of appeal—High Court Rules, Appellate Side, Rule 17.	
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Where the only point in appeal to his majesty was whether the High Court was competent to hear on the merits the appeal against the preliminary decree though no appeal had been preferred against the final decree:

Held, that the appellant was entitled to exclude from the record all documents that were not relevant to the subject-matter of the appeal to his Majesty in Council. **Khirdamoyee Dasi v. Prodyat Kumar Addy** ... 122

Document , registration of—The Indian Registration Act (III of 1877), Sec. 77—refusing to register—Review by the Registrar—Final order of refusal—Suit for registration—Limitation—Date from which it runs.	
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There is no rule of law by which a Registrar is prevented from reviving an application for registration of a document, which may have been struck off his list by reason of the non-appearance or failure to prosecute of the applicant.

Where therefore an application for registration of a document was struck off by the Sub-Registrar and the applicant applied to him for a review of that order and

Document—(Contd.)

the latter after taking evidence on both sides subsequently passed the final order refusing to register the deed:

Held, that the subsequent order was the order of refusal in respect of which the applicant was entitled to institute the suit in the civil Court, and the period of thirty days ran from the date of that order. **Sheikh**

Sajed v. Saroda Prosad Chowdhuri ... 45

Easement—Dominant and servient owners—Servient owner, if can compel dominant owner to continue easement right.

An easement exists for the benefit of the dominant tenement alone, and the servient owner acquires no right to insist on its continuance or to ask for damages on its abandonment. **Aftab Chowdhury v. Asokhadeen** ... 131

Easement—Profit a prendre—Right of fishing in another's waters; see

Fishery right ... 399

Ejectment—Invalid sub-lease by raiyat—Sub-lease, if an encumbrance—Bengal Tenancy Act (VIII of 1885), Secs. 85, 161 (a).

A sub-lease registered in contravention of section 85, sub-section (2) of the Bengal Tenancy Act is not operative against the superior landlord of an occupancy raiyat.

An under-raiyat, who came into the land in contravention of the statute without the consent of the superior landlord, cannot hold any sub-tenancy which may be treated as an encumbrance within the meaning of clause (a) of section 161 of the Bengal Tenancy Act, as against the superior landlord auction-purchaser. The landlord auction-purchaser cannot, accordingly, be called upon to annul this sub-tenancy as an encumbrance.

The term 'any sub-tenancy' in clause (a) of section 161 of the Bengal Tenancy Act is, by itself, comprehensive enough to include the interest of an under-raiyat. **Fakir Chandra Sinha Ray v. Banamali Sain** ... 252

Ejectment—Non-occupancy raiyat—Expiration of term indicated in lease—

Agricultural year ending at some later date; see Limitation ... 597

Ejectment—Transferee of a portion of non-transferable holding—Surrender—Bengal Tenancy Act (VIII of 1885), Sec. 86.

As long as the tenancy subsists, the landlord is not entitled to eject the transferee of a portion of the holding

Quære—Whether a purchaser of a portion of a holding is protected under Sub-section (6) of section 85 of the Bengal Tenancy Act?

Whether there can be a surrender effective for the purpose of section 86 of the Bengal Tenancy Act, when the condition mentioned in Sub-section (5) cannot be fulfilled. **Askar Ali v. Gopi Mohan Roy Chowdhury** ... 257

Ejectment, suit for—Image, consecration of—Endowment of land—Image destroyed by action of river—Consecration of another image in the same village—Trustees, if to apply the proceeds—Service tenure—Hindu Law—Debutter.

When an image has been mutilated or destroyed, the religious purpose does not come to an end and an endowment is not affected by the destruction or mutilation of the image. The religious purpose still survives, and a new image may be established and consecrated in order that it may be worshipped as intended by the original founder.

When land was given to the defendant for definite purposes, namely, that he might apply the income thereof for the purposes of the service of the image, established by the plaintiff's predecessor and the image having ceased to exist, a

Ejectment—(Contd.)

new image was installed and consecrated by the successor of the endower in the same village and the defendant declined to apply the proceeds of the property in the worship of the new image.

Held, that the service tenure came to an end and the defendant was not entitled to retain possession of the land. **Maharajadhiraj Sir**

Bejoy Chand Mahatap Bahadur v. Chandi Charan Chatterjee 347
Ejectment, suit for—Purchaser at revenue sale—Documents creating tenures—Some protected—Lands not protected mixed with lands protected—Decree for joint possession.

The purchasers at a revenue sale sued for recovery of certain lands as included in the estate. The defendants resisted the claim on the ground that they held the disputed lands as tenure-holders and that the tenures existed from before the time of the Permanent Settlement. They relied on four deeds in support of their claim. It was found that the two earlier deeds of 1739 and 1803 created valid tenures which existed from the Permanent Settlement; that the documents of 1835 and 1842 were conveyances of portions of the parent estate and did not create tenures that were protected at a revenue sale. The two earlier *kobalas* described the lands covered by them as *mutafuts* A and B. But the two later *kobalas* not only mentioned those *mutafuts* but also two other *mudafuts*. The defendants were in possession for a long series of years without maintaining any distinction between the several *mutafuts* and it could not be ascertained which plot belonged to which *mudafut*.

Held, that the plaintiffs were entitled to joint possession with the defendants. **Sarda Kaur Bty v. Jagabandhu Saha** ... 332
Ejectment, suit for—Putni Regulation (VIII of 1819), Sec. 11, cl. (3)—‘Resident and hereditary cultivator’—Engagement with Darputnidar.

A purchaser of a *putni* cannot under clause (3) of section 11 of the Putni Regulation, eject resident and hereditary cultivators, though they came to certain arrangements embodied in a *pattak* which professed to be a grant of *kuris* rights by the *darputnidar*. **Sarbananda Nath Bhowmik v.**

Rana Gari ... 334
Ejectment, suit for—Transfer by unauthorised person who subsequently acquired interest in property transferred—Subsequent transferee not a bona fide purchaser for value without notice—Prior mortgagee, suit by—Decree against transferor of subsequent transferee—Suit dismissed against subsequent transferee—Decree effect of—Transfer of Property Act (IV of 1882), Sec. 43—Evidence Act (I of 1872), Sec. 115

A mortgage was executed on behalf of A by her husband N in favour of B in 1877. The property passed after the death of A to N and other heirs. N then in 1886 executed a mortgage of his share, inherited from A, to C. C purchased, in execution of his mortgage decree, the property mortgaged to him and obtained possession in 1892. C was found not to be a *bona fide* purchaser, for value without notice, of the share purchased by him. In 1891, B brought a suit on his mortgage against the mortgagor's heirs and against C, as *paisne* mortgagee. In that suit C's defence was that his property was not liable as being outside the share of the mortgage in suit, and that of the representatives of the mortgagor, that it was invalid as executed by N who had no authority to execute. The suit was dismissed as against C, but was decreed against N on the ground that though the mortgage in its inception was inoperative as executed by an unauthorised person, yet it had subsequently become operative as against N in

Ejectment—(Contd.)

respect of the share which he had obtained by inheritance from A. This decree was executed by B's representative and the property in suit was purchased by them. In a suit for recovery of possession of property by B's representatives against C's representatives.

Held, that the plaintiffs were not entitled to a decree. **Hanuman Das v.**

Gursahayasingh... ... 181

Encumbrance—Under raiyat's holding—Bengal Tenancy Act. Sec. 161

: cl (a)—Invalid—Sub-lease without landlord's consent—Landlord auction-purchaser; *see* Ejectment ... 252

Enhanced rent, claim for—*Contract—Garden and bastu land—Garden converted into bastu land—Tenant, if liable to pay fair rent.*

It was stipulated in a contract by which garden and bastu lands, were let out, that if any of the garden was converted into bastu land, the rent on it should be raised from Rs. 5 to Rs. 10 per bigha. The whole land was converted into bastu. In a suit brought for reallocation of rent at the rate of Rs. 20 per bigha:

Held, that the suit was governed by the contract between the parties and the tenant was not liable to pay either a fair rent or a customary or a prevailing rent or indeed any rent except that which he covenanted to pay. **Maharaja**

Manindra Chandra Handi v. Jagannath Khan ... 324

Enhancement of rent—Conversion of cash rent into rent in kind—Bengal Tenancy Act, Secs. 29, 43; *see* Rent, suit for ... 74

Estoppel—*Non-transferable holding—Mortgagee and purchaser of equity of redemption—Mortgagee, if can question transfer of rights.*

The defendant who was a transferee from a tenant of a non-transferable holding could not be heard to say that his transferor had not a right to transfer the holding or to transfer his rights therein to the plaintiff. **Sheikh**

Jamahar v. Sheikh Nasir ... 512

Evidence, admissibility of—Civil proceeding—Statement on information and belief, when admissible; *see* Contempt of subordinate criminal Court ... 452

Evidence, admissibility of—*Infant under seven years, testimony of—Evidence Act (I of 1872), Sec. 118—Judge not interrogating infant witness, effect of—Witness, capacity of, to testify—Judge and Jury—Indian Oaths Act (X of 1873), Sec. 13*

An infant even though under the age of seven years may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath; in other words, a Court has to ascertain from the answers to questions propounded to such a witness, whether he appreciates the danger and implety of falsehood.

Before a child of tender years is questioned, the Court is not bound to test by preliminary examination his capacity to understand and to form an opinion as to the competency of the witness before the actual examination commences.

The mere circumstance that the Sessions Judge did not interrogate the witnesses, before the examination began, does not invalidate the trial.

The question of the capacity of a witness to testify is a question for the Judge himself to decide and not for the jury although after he has decided in favour of the competency of a witness, it is for the jury to determine the amount of credit to be given to the statements made by such witness. **Nasir**

Sheikh v. Emperor ... 582

Evidence, admissibility of—Previous incident, complaint as to—Evidence Act (I of 1872), Sec. 14—Indian Penal Code (Act XLV of 1860), Secs. 365, 366.

An accused cannot be convicted of the offence charged against him simply because he has been guilty of another offence. When such evidence is offered to prove his commission of the offence on trial, evidence of his participation, either in act or design, in commission or preparation, in an independent crime cannot be received; in other words, proof cannot be offered of such independent offence to show that by reason of such independent offence the accused is more likely to have committed the one for which he is on trial; evidence of such collateral offence cannot be received as substantive evidence of the offence on trial. Evidence, however, may be given to prove the elements mentioned in section 14 of the Indian Evidence Act (intention and like matters).

Evidence of previous incident is inadmissible in cases coming under section 366 of the Indian Penal Code. But when the charge is under section 365 of the said Code, the fact that a complaint was preferred against the accused in respect of the first incident, will be relevant as furnishing evidence of a motive for confining the person.

To support a conviction under section 365 of the Indian Penal Code, it must be clearly proved that, at the time of the abduction, it was the intention of the accused to secretly and wrongfully confine the person. **Baharuddin**

Mandal v. Emperor ... 578

Evidence, admissibility of—Rent collector dead—Collection papers; see Hindu widow ... 633

Evidence, admissibility of—Statement of co-accused—Evidence Act (I of 1872), Secs. 10, 30.

When the inherent quality of the statement is not a confession, it cannot be used against the co-accused. Nor can the statement be used against him under section 10 of the Evidence Act, till it has been established that there is reasonable ground to believe that there was a conspiracy between two persons.

Shahabur Ma v. Emperor. ... 590

Evidence, admissibility of—Statement made in absence of accused—No evidence showing that the accused instructed the person making the statement; see Criminal proceedings ... 365

Evidence, inadmissible, admission of—Evidence of adequate motive strong and convincing; see Criminal proceedings ... 365

Evidence, inadmissible, admission of—Grave and substantial injustice—User of evidence to prove guilt, see Criminal proceedings ... 365

Evidence of collateral offence, if can be received as substantive evidence of offence on trial; see Evidence, admissibility of ... 578

Evidence of motive—Inadmissible evidence, reception of—Commission of crime; see Criminal proceedings ... 365

Evidence Act, Secs. 10, 30—Statement of co-accused, see Evidence, admissibility of ... 590

Evidence Act, Sec 11—Reply posted immediately after telegram and referring to telegram—Cogent evidence, see Admissibility ... 567

Evidence Act, Sec. 92—Surrounding circumstances—Value of property and consideration money, contrast between, see Mortgage or conditional sale ... 228

Evidence Act, Sec. 165—Witness, examination; see Rateable distribution ... 646

Execution, application for—Co-sharer landlord, decree obtained by, for his share of rent—Suit for rent in respect of several holdings—Bengal Tenancy Act, Sch. III, Art 6; see Limitation ... 81

- Execution**, if barred—Application to file a list of immovable properties—
 Permission to file—No time fixed by Court—Petition for execution not
 amended within period of limitation, *see* Limitation ... 538
- Execution Court**, power of—Final decree, formal setting aside of, if
 necessary—Preliminary decree set aside on appeal—Final decree passed
 pending appeal against preliminary decree, *see* Final decree ... 209
- Execution Court**, if can hold summary enquiry as to fraudulent character of
 of decree, *see* Rateable distribution ... 646
- Ex parte** decree, if can be examined by revenue officer specially empowered,
see Revenue officer's power to revise ... 125
- Facts** establishing custom—Question of law, *see* Custom ... 559
- Family** arrangement—Partition by head of Mitakshara family carried
 into effect, *see* Hindu Law—Partition ... 57
- Family** custom—Proof necessary, *see* Custom ... 559
- Father's** power to compromise—Father as guardian *ad litem* of his minor
 son—Joint Hindu family—Partition, suit for—Civil Procedure Code
 (1882), Sec 462, *see* Hindu Law—Suit for partition ... 1
- Final decree**—Preliminary decree, setting aside of, effect of—Final decree passed
 pending appeal against preliminary decree—Appellate Court's jurisdiction to set
 aside preliminary decree—Final decree, formal setting aside of, if necessary—
 Execution Court, power of.
- Where in a suit for accounts a preliminary decree was passed, and the defendant
 preferred an appeal against the preliminary decree, and it was set aside by the
 appellate Court, which held that the defendant was not liable to render any account,
 and, notwithstanding that the defendant had appealed against the preliminary decree,
 the Court of first instance proceeded with the matter of taking of accounts and passed
 a final decree for a definite sum during the pendency of the appeal, and the defendant
 did not take any part in the proceedings before the Court of first instance subse-
 quent to the filing of the appeal against the preliminary decree
- Held*, upon an application for execution of the final decree by the plain-
 tiff, that the final decree could not be executed inasmuch as it was subor-
 dinate to and dependent upon the preliminary decree, and it must be taken
 to have been superseded by the decision of the appellate Court setting aside
 the preliminary decree, and that it was not necessary to have the final decree
 formally set aside. **Ram Nath Singh v. Basanta Narain Singh** ... 209
- Final decree**—Preliminary decree set aside on appeal—Final decree, passed
 pending appeal against preliminary decree; *see* Final decree, effect of ... 223
- Final decree, validity of**—Final decree passed pending appeal—Preliminary decree
 varied in appeal—Appeal.
- Where in a suit for accounts an appeal was preferred against the preliminary decree,
 and a final decree was subsequently passed during the pendency of the appeal :
- Held*, (i) that the appeal was competent, (ii) that as the preliminary decree
 was varied in the appeal, the final decree made on the basis of the original
 preliminary decree became inoperative, and a fresh final decree had to be made
 on the basis of the preliminary decree as altered. **Nistarini Debi v. Rai**
Mohan Biswas ... 214
- Final decree, effect of**—Final decree passed pending appeal against preliminary
 decree—Preliminary decree varied in appeal, *see* Final decree, validity of ... 214
- Final decree, effect of**—Partition, suit for—Preliminary decree, appeal against—
 Final decree, passing of, pending appeal—Preliminary decree, setting aside of.

Final—(Contd.)

When a preliminary decree for partition has been set aside on appeal, and pending appeal from the preliminary decree, a final decree was passed, no effect remained in the final decree. **Abdul Jalil v. Amar Chand Paul** ... 223

Final decree, formal setting aside of, if necessary—Preliminary decree set aside on appeal—Final decree passed pending appeal against preliminary decree—Execution Court, power of; *see* Final decree ... 209

Fish of river—Particular sheet of water disconnected from flowing stream or permanent current, situated in river bed; *see* Fishery right ... 399

Fishery, right of—Wrongful act in exercising—Time, running of—Limitation Act (1908), Sec. 23; *see* Fishery right ... 399

Fishery right—Easement—Limitation Act (IX of 1908), Secs. 2, cl. (5), 23—Continuing wrong, independent of contract—Burden of proof—*Jalkar*, existence of—Bed of river—Disconnection, temporary—Hunter's Statistical Accounts, reference if can be made.

A *profit à prendre*, such as a right of fishing in another's waters is an easement within the meaning of the term as defined in section 2, cl. (5) of the Indian Limitation Act. As a trespasser cannot by the very Act of trespass immediately and without acquiescence on the part of the owner become possessed of the property upon which he has trespassed, till the statutory period has elapsed, the wrongful act of the defendants in exercising right of fishery can only be deemed acts of trespass and being a case of a continuing wrong independent of contract, a fresh period of limitation, under section 23 of the Indian Limitation Act, begins to run at every moment of the time during which the wrong continues.

The proprietors of a permanently settled estate though proprietors of the territorial fisheries comprised within the ambit of their estate, are bound to prove the fact that the *jalkars*, at the time of the Permanent settlement, formed part of the assets of their *zamindari*.

Reference cannot legitimately be made to statements in Hunter's Statistical Accounts for the purpose of establishing the existence of private rights.

The bed of a river is that portion of the river which is in the ordinary and regular course of nature covered by the waters of a river. It need not be constantly covered if in the ordinary course of things it is habitually covered.

The grantee of a fishery right in the river is entitled to fish in all waters comprised within the banks of the river, and the circumstance that a particular sheet of water may, during part of the year, be disconnected from flowing stream or permanent current does not affect the rights of the grantee. A *jalkar* so situated in the river bed is essentially part of the river, and the fish contained therein may properly be deemed fish of the river.

Where the right of fishery is in a river, the Court has to be satisfied on a consideration of all the material facts and conditions whether it can fairly and reasonably be said that the waters over which the fishery is claimed are a part of the river. **Bibi Ahmadi Begum v. Tarak Nath Ghose** 399

Fishery right, grantee of, right of—Disconnection from flowing stream or permanent current—Fish of river; *see* Fishery right ... 399

Fishery right, in river—Court's duty—Waters, if part of river; *see* Fishery right ... 399

Fishing, right of, in another water's—Profit à *prendre*—Easement, *see* Fishery right ... 399

- Forfeiture**—Denial of landlord's title—Limitation Act, Sch. II, Arts. 143, 144. *see* Limitation 553
- Forfeiture**, provision for, in case of bad behaviour, effect—Instrument of partition; *see* Hindu law—Partition 57
- Fraud**—*Revenue sale*—*Defaulting co-sharer purchaser*—*Co-sharers in joint estate, relation between, as to payment of share of Government revenue*—*Mutual confidence*—*Revenue Sale law (Act XI of 1859), Sec. 7*—*Irregularity*—*Sale notification*—*Error as regards specification of shares immaterial*—*Fraud*—*Revenue sale, notice of, concealment of, evidence of, if relevant.*
- Where a revenue sale is caused by the default of a co-owner and the property is afterwards purchased at that revenue sale by that co-owner, there may be such relations between the defaulter and his co-owner as would make it right for the Court to treat such a sale as made for the benefit of both.
- Ordinarily a co-sharer in a property would be entitled to expect, in the absence of any circumstance supporting the contrary view, that his other co-sharers would act in concert with him for the common object of protecting the property in which all are jointly interested, and when a co-sharer wilfully defaults in paying the Government revenue, his conduct is not such as his co-sharers might reasonably expect from him.
- Where default had occurred owing to the wilful default of one co-sharer but of which another co-sharer might not be aware, if the former should accompany the latter to the Collector with the ostensible object of having the arrears accepted and if the application to the Collector having failed and the property having been put up for sale, the former bid for the property in concert with and not in opposition to the latter and set up some other person as the real purchaser but remained in possession and the facts supported the conclusion that the whole previous conduct of the first-mentioned co-sharer, taken in conjunction with and explained or interpreted by his later conduct indicated that from the first act in defaulting up to the final act when he attempted to secure possession and title as against his co-sharer by setting up a third person as the purchaser he had intended to mislead and overreach his co-sharers;
- Held*, those facts would be sufficient to support a case of fraud.
- A co-sharer is not under any legal obligation to his co-sharers to pay in his share of the Government revenue.
- Evidence to prove the concealment of notice of revenue sale is relevant to support the allegation of fraud.
- The residue of estate to be sold for arrears of revenue must be described in the notification of sale with sufficient accuracy and fulness to enable the impending purchaser to know what is in fact the property that is offered for sale, and where the residue share is entered in the notification as the residue only without giving its amount or giving the shares of which it consists or stating the other shares which are excluded from the sale, such a description is not a sufficient compliance with section 13 of the Revenue Sale Law. The fact that shares in certain mouzas were entered 2 as. 11 p. instead of 2 as. 8 p. and which mistake was not a material one, would not make the sale notification an irregularity and illegality. **Chowdhury Ram Prasad Singh v. Chowdhury Pawan Singh** ... 97
- Fraud**—*Suit for declaration of title and possession*—*Fictitious suit, decree and sale*—*Agreement to execute release*—*Specific performance*—*Limitation*—*Fictitious conveyance*—*Fictitious vendee, if defrauded*—*Relief*—*Civil Procedure Code (Act XIV of 1882), Sec. 317.*

Fraud—(Contd.)

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud, must be effected, when and where alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with.

Section 317 of the Code of Civil Procedure contemplates a real sale in execution of a real decree in a real suit. It is not applicable to the case of a fictitious sale held in execution of a fictitious decree obtained in a fictitious suit.

In 1893, a tenant executed a fictitious conveyance of his land in favour of A with a view to protect himself from invasion of his rights by his landlord. In 1899, he, to protect himself from A, who proved unfaithful, induced his landlord to institute a fictitious suit for rent. That suit was decreed on the 7th November, 1899. The landlord took out execution of that decree. A thereupon preferred a claim which was disallowed on the 20th January, 1900. The decree was subsequently executed and at the sale which followed, the landlord purchased the holding on the 19th March, 1900 and possession was delivered on the 5th June, 1900. On the 10th April, 1900, A sued the tenant and the landlord for declaration of his title on the basis of his conveyance; but on the 23rd July, 1900, this suit was withdrawn. In 1906, the landlord turned against the tenant and with the help of the police took away by force the crops raised by him. On the 15th March, 1907, the tenant commenced the present suit for declaration that the entire proceedings in the rent suit of 1899 were fictitious and that the landlords did not acquire any title on the basis of their purchase at the execution sale. The plaintiff also alleged that the landlord defendants agreed to execute a release and in the prayer clause of the plaint he asked for a decree for execution of such release by the landlords.

Held, that as the suit was in essence one for declaration of title to land and for confirmation of possession and not for specific performance of a contract, it was not barred by limitation.

that as the conveyance in favour of A was a fictitious document, A had no real title to the property and was not defrauded, and the plaintiff consequently was not disentitled to protection in a Court of equity,

that section 317 of the Code of Civil Procedure was no bar to the maintainability of the suit. **Akhil Pradhan v. Manmatha Nath Kor** ... 616

Fraud, allegation of—Evidence to prove concealment of notice of revenue sale, *see* Fraud ... 97

Fraudulent grantor, when loses right to claim property from fraudulent confederate; *see* Fraud ... 616

Full Court of Small Cause Court, power of, to review finding of fact; *see* Civil Procedure Code (1903), Sec. 115 ... 594

Garden converted into *bistui* land—Tenant, liability of—Contract—Garden and *bistui* land; *see* Enhanced rent, claim for ... 324

Grant—Property vested in grantee and his descendants—Hereditary estate, if cut down by direction to maintain certain persons; *see* Possession, suit for ... 31

Grant, effect of, *see* Saltpetre, exclusive right to dig ... 151

Grant, invalid—Rent, acceptance of, effect of; *see* *Hikimali* tenure ... 23

Grant, nature of, determination of—Terms ambiguous—Subsequent conduct of parties, reference to; *see* *Hikimali* tenure ... 23

Grant of inheritance—Presumption—Descent from father to son—Usage; *see* Jagir ... 277

Grantee of fishery rights, rights of—Disconnection from flowing stream or permanent current—Fish of river; <i>see</i> Fishery right	...	...	399
Grave and substantial injustice—Inadmissible evidence, admission of—User of, to prove guilt; <i>see</i> Criminal proceedings	...	...	365
Guardian-ad-litem , if can apply to set aside award—Limitation Act (1877), Sch. II, Art. 158—Reference to arbitration—Consent of person having no authority to act on behalf of guardian of infant, <i>see</i> Appeal...	...	...	35
'Guardian for the suit' —Civil Procedure Code (1882), Sec. 441; <i>see</i> Decree, setting aside of	...	...	384
Head of the family, power of, to partition by will; <i>see</i> Hindu Law—Partition	...	...	57
High Court —Power to summarily punishing for contempt of its authority; <i>see</i> Contempt of subordinate criminal Court	...	...	524
High Court , if can punish for contempt of subordinate criminal Court; <i>see</i> Contempt of subordinate criminal Court	...	...	452
High Court's right to treat as contempt any act committed within the local limits of High Court's Original Jurisdiction; <i>see</i> Contempt of subordinate criminal Court	...	...	452

Hikimall tenure—*Lease—Invalid grant—Rent, acceptance of—Occupancy right, acquisition of, under trespasser—Bengal Rent Recovery Act (X of 1859)—Grant, nature of—Adverse possession.*

A *Hikimall* tenure is dependent on the life of the zeminder and not on that of the tenure-holder himself.

If there has been an invalid grant, the acceptance of rent from the grantee does not necessarily operate as a recognition or affirmation of the authority and validity of the grant.

Under Act X of 1859, a right of occupancy can be acquired under a trespasser, and such right can also be acquired when the grantee was let into occupation by a temporary intermediate holder.

In order to determine the true nature of a grant, the terms whereof are ambiguous, reference to the subsequent conduct of the parties may be necessary.

Adverse possession will not be of any avail to a mokraridar against a zemindar, unless it is brought to the knowledge of the zemindar against whom the adverse title is sought to be acquired. **Radha Madhab Narain**

Hikim v. Milan Mahato ... 23

Hikimall tenure, nature of; *see* *Hikimall* tenure ... 23

Hindu Law—Adoption—Married orphan, adoption of—Agarwal Banias of Zira in the Punjab—Custom.

• Where the Courts below concurrently found that in matters of adoption the Agarwal Banias of Zira in the Punjab do not follow the general rules of the Hindu law but are governed by custom that amongst them an unequivocal declaration by the adopting father that a boy has been adopted and the subsequent treatment of that boy as the adopted son is sufficient to constitute a valid adoption and that the respondent, an orphan and a married man, had in fact been adopted according to that custom:

Held, that the concurrent findings must be confirmed, but that the present case, owing to the limited nature of the evidence as to the custom, would not be a satisfactory precedent if in any future instance fuller evidence regarding the alleged custom of the Agarwal Banias of Zira should be forthcoming.

Hindu Law—(Contd.)

That such evidence was sufficient as between the parties to the present suit and those claiming through or under them. **Ohiman Lal v. Hari**

Ohand ... 70

Hindu Law—Partition—Mitakshara School—Ancestral property—Minors—Father's power to bind his minor sons—Share given to a stranger—Practice—Suit by a Hindu governed by the Mitakshara law to set aside his father's alienation of ancestral property—Form of the suit—Nature of relief to be granted—Equity between the father and his alienee.

Although a partition made by a Hindu father of a joint undivided ancestral estate, subject to the Mitakshara law, may, under some circumstances, bind his minor sons, yet if on the partition a share is given to an absolute stranger, the partition may be impeached as a disposition of property made without consideration, unless it can be supported as a *bona fide* compromise of a disputed claim.

A person, who as having been adopted in the family, has received a share on partition of the joint undivided ancestral property governed by the Mitakshara law, is in the view of the law an absolute stranger in a suit against him to make restitution of the share so received by him on the ground that his adoption was wholly invalid.

Where a Hindu father governed by the Mitakshara law has given on partition a share of ancestral estate to an absolute stranger, a suit brought by the sons against the recipient of the share and their father to recover possession of the share so given, is bad in form, but it is competent for the Courts to make the whole or any part of the relief granted in such a suit to the sons conditional on their assenting to a partition so far as regards their father's interest in the estate, so as to give effect to any right to which the said recipient may be entitled claiming through their father. **Ram-**

kishore Kedarnath v. Jainarayan Ramraohpal ... 237

Hindu Law—Partition—Mitakshara Joint family—Ancestral property—Head of the family, power of, to partition by will—Will, requisites of—Calling the instrument of partition a will, effect of—Family arrangement—Acceptance thereof by members of the family—Provision for forfeiture in case of bad behaviour, effect of.

In the ancestral property the members of a Hindu joint Mitakshara family have independent right with which the head of the family cannot interfere, and therefore, he has no right to make a partition by will of such property among the various members of the family except with their consent, which would bind not only them but also their sons as they would be representing in the transaction their respective branches of the family.

The head of a Hindu joint family executed a document which was called a will, setting out a division of the ancestral family property among his three sons, reserving nothing for himself, and the evidence established that the partition thereby made was acted upon by all the parties interested :

Held, that a will speaks from a future date, *vis*, the death of the writer, and consequently it was a complete misnomer to apply the term to a document which was intended to speak from the date at which it was written and was, in fact, and was intended to be viewed as, record of a family arrangement then and there made and carried into effect partitioning the family estate among those interested :

Held also, that the head of the family had no power to make such a partition by will strictly so-called, and that the fact that the document was called a will did

Hindu Law—(Contd.)

not invalidate the partition thereby made and acted upon by all the members of the family.

It was contended that the partition was not intended to take effect *in presenti* in view of the fact that the document provided that in case of mis-management or bad behaviour on the part of any of the sons the executant would have power "to cancel the will, which could be enforced from the date of its execution."

Held, that the highest effect of the provision was that it evidenced a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property and viewed in that light the contractual acceptance of a power of forfeiture in case of bad behaviour was not sufficient to prevent the partition operating *in presenti*, but that the true interpretation of the provision was that it was merely put in as a threat in order to keep the sons in good behaviour and that it could not have been enforced specifically or at all and was quite insufficient to outweigh the overwhelming evidence that the document was a family arrangement accepted by all parties. **Kunwar Brijraj Singh v. Kunwar**

Sheodan Singh

57

Hindu Law—Presumption—Separation—Evidence—Separate entries in revenue records—Inferences from the acts of the members of the family.

Where in a suit the question was whether the plaintiffs, who were brothers, were separate in estate from their deceased half-brother at the time of his death in 1907 and the proved or admitted facts were that the names of the five brothers were separately entered in the revenue records in regard to specified areas of one of the villages in suit, that in 1900 they dealt with those areas as separate owners thereof, that in 1878 there was a partition among them of another village, that there was an entry of the deceased half-brother's name alone in respect of a third village, and of the names of the plaintiffs in respect of a fourth village, and that the five brothers enjoyed separately their respective *sir* lands.

Held, affirming the High Court, that the separate entries in the revenue records standing by themselves were not sufficient to rebut the presumption of Hindu Law relating to jointness or to prove separate possession by different members of a family which in its inception was admittedly joint, but that such entries together with the inferences drawn from the said facts, which tended to show a separation and were consistent only with the hypothesis of separation, left no doubt that at the time of his death the deceased half-brother was separate from his brothers, the plaintiffs. **Net Ram**

Singh v. Mussammat Tarsa Kunwar

234

Hindu Law—Succession—Zemindari—Madras Regulation (XXV of 1802).

A zemindari, which is the subject of a *sanad* in common form under the Madras Regulation XXV of 1802, is partible and descendible according to the ordinary rules of inheritance of the Hindu law, unless the *sanad* could operate as the confirmation of a previously existing estate which from its nature or by virtue of some special family custom was impartible and descendible to a single heir.

Where the question was whether the zemindari of Nidadavole, which was the subject of a *sanad* in common form under the Madras Regulation XXV of 1802, was impartible, and no reliance was placed on any special family custom but it was contended that the grantee under the *sanad* had at and prior to the date thereof an estate which was of the nature of a Raj or principality and therefore impartible.

Hindu Law—(Contd.)

Held, affirming the Courts below, that the zemindari in question was not in the nature of a Raj, and that it was partible and descendible according to the ordinary rules of inheritance of the Hindu law. **Sri Raja Venkata**

Narasimha Appa Row v. Sri Raja Parthasarathy Appa Row ... 393

Hindu Law—Suit for partition—Joint Hindu family—Father as guardian ad litem of his minor son—Father's powers to compromise—Code of Civil Procedure (Act XIV of 1882), Sec. 462—Sanction of Court.

Where a Hindu father is party to a partition suit and is himself the next friend or guardian of his minor son, who is also a party to the suit, the father's powers to bind the minor son by a compromise of the suit are controlled by section 462 of the Code of Civil Procedure, 1882, and he cannot do any act in his capacity of father or managing member which he is debarred from doing as the next friend or guardian without the leave of the Court.

Where in a suit for partition of joint Hindu family property, a father was party and was himself the guardian *ad litem* of his minor son (also a party to the suit), the decree directed that certain monies should be paid to the father, who afterwards under a compromise entered satisfaction of the decree:

Held, that the fact that monies were made payable to the father who was admittedly representing his branch of the family, made no difference in the duty which lay on him to obtain the leave of the Court to a compromise which was clearly intended to affect the rights and interests of his son; and that as no leave was obtained from the Court in regard either of the compromise or the satisfaction entered thereunder of the decree, they were not binding on the son, who must be remitted to his original rights under the decree.

Ganesha Row v. Tuljaram Row ... 1

Hindu widow—Unauthorized reduction of rent—Reversioner, if bound—Road cess return filed by Hindu widow, if can be used in favour of reversioner—Cess Act (IX B. C. of 1880), Sec. 95—Evidence Act (I of 1872), Sec. 32, cl. (3)—Collection papers, admissibility of—Person who collected rent, dead—Additional rent for excess land—Proof.

A Hindu widow has no authority to affect the estate in her hands by unrestricted disposition in charity; but gifts to Brahmins or to Idols to a small extent may be binding upon the estate, in the hands of the reversionary heirs.

A Hindu widow during her possession of her husband's estate, reduced the rent payable by a tenant as a reward for services rendered by him:

Held, that as the alienation was without any necessity or in any way conduced to the spiritual welfare of her husband, the reduction of rent was unauthorized and did not bind the reversioner.

Road cess return is inadmissible in favour of not only the person who filed it but also any person who claims through him or may be deemed to be his representative in interest. A reversioner is not a person who claims through a widow or may be deemed to be her representative in interest.

Section 95 of the Cess Act is not exhaustive and is no bar to the reception of the road cess return in evidence, if it is admissible under any of the provisions of the Indian Evidence Act. Hence a road cess return filed by a Hindu widow is admissible in favour of the reversionary heir under section 32 clause (3) of the evidence Act.

The fact that the man who collected rent as stated in the collection papers was dead, does not necessarily render impossible their reception in evidence.

Hindu widow—(Contd.)

In order to establish that the plaintiff is entitled to additional rent in respect of excess land, the plaintiff must prove that the defendant is in possession of excess land, that is, in possession of land for which he does not pay rent.

Laohi Prosad Chowdhury v. Jag Mohan Lal Chaudhary ...	633
Hindu widow , if can affect estate in her hands unrestricted disposition in charity; <i>see</i> Hindu widow ...	633
Hindu widow , if can make gift to Brahmins or to idols to a small extent—Reversioner, if bound; <i>see</i> Hindu widow ...	633
Hindu widow , if can devise property inherited from husband with consent of next-reversioners.	

A Hindu widow cannot with the consent of the next reversioners bequeath properties inherited by her from her husband so as to confer an absolute title upon the devisee. **Durga Sundari Sen Gupta v. Ram Krishna**

Poddar ...	162
Hindu widow executing permanent lease—Lease declared invalid—Lessee if can acquire occupancy right; <i>see</i> Ralyat at fixed rate, if can claim occupancy right ...	536
Hunter's Statistical Accounts, statements in, reference to, validity of—Private rights, existence of; <i>see</i> Fishery right ...	399
Ideal possession —Trespasser—Rightful owner; <i>see</i> Dispossession ...	274
"If no application has been made to set aside the award"—Civil Procedure Code (1882), Sec. 522—Contingency—Remission of award; <i>see</i> Appeal ...	35
Image , consecration of—Image, mutilation or destruction of—Endowment; <i>see</i> Ejectment, suit for ...	347
'Import' —Bengal Excise Act, Secs. 2(12), 46, 61; <i>see</i> Admissibility ...	567
Infant under 7 years of age, testimony of—Criminal prosecution; <i>see</i> Evidence, admissibility of ...	582
Infant witness , judge not interrogating, effect of; <i>see</i> Evidence, admissibility of ...	582
Injurious affection —Land fetching less value by reason of declaration—No diminution of rent; <i>see</i> Land acquisition ...	244
Injurious affection to land —Land Acquisition Act, Sec. 23, Sub-Sec (4); <i>see</i> Land acquisition ...	244
Informers' evidence —Confession—Non-production of evidence as to the circumstances of an informer's arrest and confession, effect of; <i>see</i> Criminal proceedings ...	365
Insolvency proceeding —Receiver, appointment of—Receiver acting in excess of his authority—Third person, remedy of—Provincial Insolvency Act (III of 1907), Sec. 32—'Person aggrieved'.	

When a Receiver has been appointed under the Provincial Insolvency Act, he becomes an officer of the Court, and if he is about to act in excess of his authority, it is competent to a stranger to bring that fact to the notice of the Court, which has inherent power to review the conduct of the Receiver and to make an appropriate order so that the stranger may not be prejudiced by an unlawful act of its own officer; and for this purpose, the Court may hold a summary enquiry.

'A person aggrieved,' in section 22 of the Provincial Insolvency Act means a person who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused:

Insolvency proceeding—(Contd.)

him something or wrongfully affected his title to something, and does not mean a person who has lost a benefit which he might have obtained, if an order has been made.

During the pendency of proceedings under the Provincial Insolvency Act, the mortgagee in execution of his mortgage decree purchased the properties under mortgage. The mortgagor was subsequently adjudged an insolvent and a Receiver was appointed with a direction to act in accordance with law. On the 25th July, 1911, the Receiver sent to the Court as a sale proclamation in which he included the properties purchased by the mortgagee. The sale proclamation was served on the 1st August, 1911. On the 28th August, 1911, the mortgagee-purchaser appeared in Court and presented a petition of objection in which he stated that the Receiver had no authority to sell the properties purchased by him:

Held, that section 22 of the Provincial Insolvency Act had no application to such a case. **Hansowar Ghose v. Bakhal Das Ghose** ... 359

Insolvent, adjudgment as—Purchase of insolvent's property before adjudgment—Property advertised for sale by Receiver—Purchaser, remedy of; *see* Insolvency proceeding ... 359

Instrument, alteration of, effect of—Change of legal identity or character of instrument; *see* Mortgage suit ... 354

Instrument, alteration of—Insertion of clause for compound interest—Knowledge and consent of mortgagor, absence of; *see* Mortgage suit ... 354

Interest on kists—Monthly kists—Rent—Landlord and tenant; *see* Contract ... 175

Interlocutory order—Order deciding suit not barred under Sec. 91 of the Chota Nagpur Act and remanding the case for retrial—Civil Procedure Code, Sec. 109; *see* Leave to appeal to Privy Council ... 124

Invalid grant—Rent, acceptance of, effect of; *see* *Hikmal* tenure ... 23

Irregularity—Error of law—Error not affecting merits of case—Revision—Civil Procedure Code (1908), Sec. 99; *see* Remand ... 613

Issue sent down—Whole appeal, if can be heard.

When an issue had been sent down, the appeal pending in the High Court after the finding had been received, the whole appeal was open for consideration. **Hanuman Das v. Gursahay Singh** ... 181

Jagir—Grant, if conditional—Tenure created by document—Construction—Presumption—Contract with qualification made with other persons, admissibility of.

A jagir is not necessarily conditional; it may be unconditional as when it is a grant for services already rendered.

When a tenure is created by a document, the terms on which the land is held, its alienability and its liability to forfeiture, depend on the terms of the particular grant, and not on the terms of grants that may have been made to others.

Where the question is whether A made a contract with B subject to certain qualification, evidence of the fact that he made contracts with other persons subject to the same qualification, is inadmissible.

The element of a different personality is so important in affecting the making of the terms of a contract that the likelihood of making a similar contract with different person is very much smaller when a contract is sought to be evidenced by other contracts with different persons than even in the case where a contract is sought to be evidenced by other contracts with the same person.

If it is proved by long uninterrupted usage that the lands have passed from ancestor to heir, that is, from father to son, for two or three generations without

Jagir—(Contd.)

objection, the inference would be that the grant was a grant of inheritance, because the fact of descent from father to son is the strongest possible evidence of its hereditary character.

Obiter—When service can no longer be enforced and the tenure consequently ceases to be a service tenure, the land can be alienated. When an estate is freed from the burden of service, the reason for the preservation of the estate as inalienable, disappears; alienation can be prohibited only with a view to prevent permanent severance of the estate from the services annexed to it. **Bhagwat Bukah Roy v. Sheo Pershad Sahu** ... 277

Jagir, if conditional; *see* Jagir ... 277

Jalkar, existence of—Permanently Settled estate—Burden of proof; *see* Fishery right ... 399

Joint family—Separate property—*Nyctues*; *see* Burden of proof ... 548

Joint family property—Partition—Oudh Estates Act, Secs. 2, 3, 8—Estate—Summary Settlement—Impartibility; *see* Oudh Law ... 200

Joint possession, decree for—Tenures, protected and unprotected, mixed together—Purchaser at revenue sale; *see* Ejectment, suit for ... 332

Judicial decision—*Conjecture*.

Conjecture is not a sound basis for judicial decision **Hilmadhab Mahata v. Raj Kishore Das** ... 220

Jurisdiction—Rule, hearing of—Rule obtained on behalf of dead person—Civil Procedure Code (Act V of 1908), O. 22, R. 3.

A Rule cannot be issued at the instance of a person who is dead at the time the application is made. A Rule so issued is a nullity.

The principle recognised in Rule 3 of order XXII of the Code of Civil Procedure is applicable not only to suits, but also to proceedings in revision.

Anandamoyi Das v. Rudra Mahanti ... 141

'**Kabillagan**', meaning of; *see* Presumption ... 166

Kutchery, obstruction in erection of—Loss of goods—Negligence; *see* Damages, suit for ... 327

• '**Lakhraj**', What connotes; *see* Presumption ... 166

Lambardar—Lambardar, if can settle vacant land—Principle and agent—Authority conferred by two or more persons, if can be revoked by one—Contract Act (IX of 1872), Secs. 203, 204, 208—Revocation of agent's authority, when affects third person—Notice, nature of—Burden of proof.

A lambardar has no statutory but may have customary authority to make a settlement, with the tenants, of land vacated by the original tenant.

Where authority is conferred on an agent by two or more principals jointly, the authority may be revoked by one, and it is sufficient if notice of revocation is given by one of the principals. The revocation of the authority of an agent may take effect, in so far as third persons are concerned, at a point of time different from the moment when it takes effect with regard to the agent himself. As to the agent himself, the revocation takes effect from the time when it is made known to him, and, as to third persons, when it is made known to them, and not before; and until revocation is so made known, it is inoperative. If known to the agent, as against his principal his rights are gone, but as the third persons who are ignorant of the revocation his acts bind both himself and his principal. Where one has been the agent constituted and accredited to carry on business for another, his authority to bind his principal continues after actual revocation as to

Lambardar—(Contd.)

those who have been accustomed to deal with him as such agent, until notice of the revocation of his agency is brought home to them. This rule is based on the principle that a person, who has accredited another as his agent, is estopped from denying that agency at a subsequent time, as against the persons to whom he has accredited him, by reason of any such revocation.

As regards third persons, express or actual notice is not necessary. It is sufficient to establish that the persons had knowledge that the authority of the agent had been revoked. The burden of proof is on the principal to establish that the third persons were aware of the revocation of the agent's authority. **Dasrath Patel v. Braja Mohan Gaontia** ... 621

Lambardar's right to settle vacant land; *see* **Lambardar** ... 621

Land not agricultural or horticultural; *see* **Raiyati** interest ... 232

Land acquisition—Compensation—Back land—Injurious affecting—Land Acquisition Act (1 of 1894), Sec. 23, Sub-sec. (4)—Acquisition for certain purpose, if can be abandoned.

It is reasonable in seeking to fix the proportion of value between the back land and the frontage land, to consider how far the land stands back from the road.

The principle laid down in *Essex v. The Act on Local Board* is applicable to India regarding injurious affection to land.

A public body which has acquired land in this country for one specific purpose, may not subsequently abandon that purpose and use the land so acquired for some other purpose for which they have not acquired it.

Per Banerjee J.—The rent realised from the land is not the sole basis for determining the market value. The market value of any land is to be determined not necessarily according to its present disposition, but laid out in the most lucrative and advantageous way in which the owner can dispose of it.

If, by reason of the declaration, the land, if offered for sale, would have fetched less, the land was injuriously affected notwithstanding that there was no actual diminution of the rent. **Gurudas Kundu Chowdhury v. The Secretary of State for India in Council** ... 244

Land Acquisition Act, Sec. 23, Sub-sec. (4)—Injurious affection to land; see Land acquisition ... 244

Landlord, decree-holder's right under rent decree—Execution against what property; *see* **Rent** decree, execution of ... 29

Landlord, purchase by, in execution of his money decree, defaulting tenure, subject to rent charge, effect of; *see* **Rent** decree, execution of .. 29

Landlord, when cannot eject transferee of a portion of holding; *see* **Ejectment** ... 257

Landlord dispossessing tenant from whole or part of the holding—Dispossession, nature of; *see* **Rent**, suspension of ... 509

Landlord and tenant—Contract to pay rent in monthly kists, if valid—Interest on each kist as it falls due, contract, if valid; *see* **Contract** ... 175

Law of contempt, when applicable in India; *see* **Contempt** of subordinate criminal Court ... 452

Lease, construction of—Agreement not to take particular defence, non-performance of—Agreement, if enforceable; *see* **Penalty** ... 95

Lease as to entirety, if can be enforced for part—Lease by a member of a joint Mitakshara family of his share; *see* **Specific performance**, suit for ... 344

- Leave** to amend notice of motion, when can be given; *see* Contempt of subordinate criminal Court ... 452
- Leave** to appeal, by whom to be given—Order deciding a question in controversy between parties—Provincial Insolvency Act, Sec. 46 cl. (3); *see* Provincial Insolvency Act, Secs. 16, 20, 46 (3) ... 564
- Leave to appeal to Privy Council**—*Appeal, if lies—Decree in apportionment case—Land Acquisition Act (1 of 1894), Sec. 54.*
No Appeal lies to His Majesty in Council against a decree in an apportionment case under the Land Acquisition Act. **Ram Soahi Roy v. C. H. Grey** ... 123
- Leave to appeal to Privy Council**—*Decision of third Judge on reference—Calcutta Letters Patent, (1865), Cl. 41.*
Leave to appeal to Privy Council from a decision of a third Judge in a criminal case on a reference arising from difference of opinion of two Judges of the High Court, being one not coming under clause 41 of the Calcutta Letters Patent, refused. **Ataur Singh v. King-Emperor** ... 121
- Leave to Appeal to Privy Council**—*Interlocutory order—Order not deciding rights of parties—Order of remand—Final order—Civil Procedure Code (Act V of 1908), Sec. 109—Suit, frame of, not bad.*
An order deciding that the suit as framed was not barred under section 91 of the Chota Nagpur Tenancy Act and remanding the case for trial on the merits, is not a final order within the meaning of section 109 of the Code of Civil Procedure and hence no appeal lies to His Majesty in Council. **Krishna Chandra Ghosh v. Maharaja Ram Narain Singh Bahadur** ... 124
- Leave to appeal to Privy Council**—*Order passed by High Court in Criminal revision—Criminal Procedure Code (Act V of 1895), Sec. 118—Calcutta Letters Patent (1865), Cl. 41.*
No appeal lies under clause 41 of the Calcutta Letters Patent to His Majesty in Council against an order passed by the High Court on the Appellate Side, under section 118 of the Code of Criminal Procedure under which the petitioner was bound down to be of good behaviour for a period of three years and was required to execute a bond with two sureties. **Ohintamon Singh v. King-Emperor** ... 119
- Legal evidence**—Statement on information and belief—Contempt of Court in respect of printing and publication of articles in a newspaper; *see* Contempt of subordinate criminal Court ... 452
- Legal process**, disregard of forms of—Doubt as to innocence—Conviction; *see* Criminal proceedings ... 365
- Legal representative** of judgment-debtor not brought on record, effect of—Judgment-debtor, death of, after attachment and before sale—Sale, if invalidated—Irregularity; *see* Certificate sale ... 628
- Letter** by accused self-disserving—Signature, if necessary—Surreptitiously detained and opened—Addressee not receiving; *see* Admissibility ... 567
- Letter** by accused self-disserving, when evidence against him; *see* Admissibility ... 567
- Letters patent** (1865), cl. 41—Decision of third Judge on reference; *see* Leave to appeal to Privy Council ... 121
- Letters patent** (1865), cl. 41—Order passed in criminal revision; *see* Leave to appeal to Privy Council ... 119

Libel—*Malicious prosecution—Proceedings under Bengal Disorderly Houses Act (III B. C. of 1906)—Limitation Act (IX of 1908) Sch. I, Arts 23, 24.*

When proceedings are taken against a person under the Bengal Disorderly Houses Act, he cannot be said to be maliciously prosecuted.

An allegation by the defendant in his report to the Magistrate in proceedings under the Bengal Disorderly Houses Act comes under article 24 of the Schedule I of the Indian Limitation Act and a suit should be instituted within one year from the date of the libel. **Dhiraj Bala Dasi v. Gopal**

Chandra Mukhopadhyaya ... 352

Limitation—Applications for separation of taluk in 1799 and 1801, if can be given effect to in 1906—Century of litigation, if kept applications pending—Fresh application, if maintainable; see Application for separation of taluk ... 526

Limitation—*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Constructive dispossession—Dispossession by person not landlord—Landlord favouring dispossession.*

Under Article 3, Schedule III of the Bengal Tenancy Act, there must be dispossession by the landlord. The landlord's simply favouring the dispossession does not come within that Article. **Basanto Kumari v. Nando**

Ram Kaibarto Dass ... 86

Limitation—*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Dispossession.*

Under Article 3, Schedule III of the Bengal Tenancy Act, it must be clearly made out that any particular case falls within its terms. In each case, it has to be seen whether in fact, there has been such dispossession as the Article requires. That dispossession must be by the landlord. **Budra**

Narain Maity v. Hatobar Jana ... 89

Limitation—*Bengal Tenancy Act (VIII of 1885), Sch. I III, Art. 6—Co-sharer landlord—Several holdings—Decree for share of rent, execution of.*

Article 6 of Schedule III of the Bengal Tenancy Act is applicable where the decree has been made in a suit between a landlord and a tenant to whom (and not to which), the provisions of the Act are applicable. It is immaterial that all the provisions of the Act are not applicable to the suit.

Where a decree was obtained by one of several joint landlords for his share of the entire rent and was made in a suit in which rent was claimed in respect of several holdings in the occupation of the tenant, an application for execution was held to be governed by Article 6 of Schedule III of the Bengal Tenancy Act. **Mritunjoy Bhattacharjee v. Bholu Nath Dutt** ... 81

Limitation—*Decree, execution of—Civil Procedure Code (Act V of 1908), Order XXI, Rule 17—Application to file a list of immovable properties—Permission to file—No time fixed by Court—Petition for execution, not amended within the period of limitation—Execution proceedings whether barred.*

A decree-holder made an application for execution of his decree, and before the period of limitation had arrived he applied to the Court under Order XXI, Rule 17 of the Code of Civil Procedure to be allowed to file a list of immovable properties. The Court simply made the order "permitted," and did not fix any time within which the list was to be filed. The list was subsequently filed after the period of limitation had already run:

Held, that the proceedings in execution were barred by limitation, inasmuch as the provisions of Order XXI, Rule 17, Sub-Rule (2) were not complied with and the necessary formalities were not carried out within the time

Limitation—(Contd.)prescribed by law. **Nawab Sir Salimullah Bahadur v. Sainaddi****Markar** ... 538**Limitation—Forfeiture—Denial of landlord's title—Limitation Act (XV of 1877),***Sch. II Arts. 143, 144.*

A suit for possession on the ground of forfeiture for repudiation of the title of the plaintiff is governed by Article 144 and not by Article 143, Sch. II, of the Indian Limitation Act. **Bhairab Chandra Naskar v. Kadam**

Bawa ... 553

Limitation—Minor, several years after attainment of majority, suing for declaration of nullity of decree; see Decree, if void ... 18

Limitation—Period from which time runs—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3, cl. (a)—Lease—Agricultural year—Non-occupancy raiyat—Ejectment.

The period for a suit to eject a non-occupancy raiyat is six months from the expiration of the term of the lease. Where the expiration of the term is indicated in the lease itself, the fact that an agricultural year ends at some later date will not extend the date of cause of action. **Durbijoy Mander**

v. Damani Bhagat ... 597

Limitation Act (1877), Sec. 5, Sch. II, Art. 158—Award, objection to, time for filing, if can be extended; see Appeal ... 35

Limitation Act (1877), Sch. II, Art. 106—Dissolution, presumption of—Evidence—Accounts—Subsequent conduct of parties; see Partnership business, claim for a share of ... 13

Limitation Act (1908), Sec. 2, cl. (5)—Easement—Profit à prendre—Right of fishing in another's waters; see Fishery right ... 399

Limitation Act (1908), Sec. 18—Fraud of execution-creditor—Time for application, if can be extended—Bengal Tenancy Act, Sec. 174; see Sale, setting aside of ... 533

Limitation Act (1908), Sec. 23—Trespass—Wrongful act in exercising right of fishery—Time, running of; see Fishery right ... 399

Limitation Act (1908), Sec. 28—Suit for recovery of possession, bar of—Title, extinguishment of; see Declaratory suit, maintainability of ... 608

Limitation Act (1908), Sch. I, Art. 24—Allegation in report to Magistrate in proceedings under Bengal Disorderly Houses Act; see Libel ... 352

Limitation Act (1908), Sch. I Art. 142.—Burden of proof, see Declaratory suit, maintainability of ... 601

Limitation Act (1908), Sch. I, Art. 142—Trespasser—Ideal possession; see Disposition ... 274

Limitation Law, what, applicable; see Disposition ... 274

Loss of goods—Obstruction in erection of Kutcheri—Negligence; see Damages, suit for ... 327

Maddamash grant—Regulation XXXVII of 1793, Sec. 15—Regulation XIV of 1825, Sec. 3, cl. (3); see Possession, suit for ... 31

Madras Regulation XXV of 1802—Sanad in common form—Zemindari, nature of; see Hindu Law—Succession ... 393

Maintenance grant, when can be resumed; see Possession, suit for ... 31

Maktaridar, adverse possession of, when available against Zeminder; see Hikimali tenure ... 23

- Malicious** prosecution—Bengal Disorderly Houses Act, proceedings under;
see Libel ... 352
- Market** value—Rent—Lucrative and advantageous; *see* Land acquisition... 244
- Material** alteration of instrument—Burden of proof—Purchaser of equity of redemption; *see* Mortgage suit ... 354
- Member** of a joint Mitakshara family, if can validly alienate his share; *see* specific performance, suit for ... 344
- Minor**, when becomes a party to suit—Guardian-*ad-litem*, appointment of; *see* Decree, if void ... 18
- Minor** unrepresented—Minor described as under the guardianship of certain person—No order by Court under by Section 413 of Code of Civil Procedure (1882), effect of; *see* Decree, setting aside of ... 384
- Misjoinder**—Decision in favour of plaintiff, if can be questioned in appeal—Civil Procedure Code (1908), Sec. 99
 The effect of section 99 of the Code of Civil Procedure is that when the Court of first instance decides the question of misjoinder in favour of the plaintiff, there is an end of the matter and the defendant is precluded from raising the question in appeal. **Himat Khan v. Sher Khan** ... 260
- Misjoinder**, decision on, in favour of plaintiff, if can be questioned in appeal—Civil Procedure Code (1908), Sec. 99; *see* Misjoinder ... 260
- Mitakshara** family—Member, if can validly alienate a share; *see* specific performance, suit for ... 344
- Mortgage**—Interest—Sum borrowed for litigation—Immoral or illegal.
 A mortgagee is *prima facie* entitled to interest at the rate mentioned in the contract, unless the mortgagor proves that the bond was taken under circumstances which made the provision as to payment of interest not enforceable against him.
 It cannot be affirmed as an inflexible rule of law that a debt incurred for the purposes of a litigation is either immoral or illegal.
 Where a considerable portion of the debt was incurred with a view to satisfy a mortgage-decree in execution whereof the properties covered by the mortgage in suit were about to be sold, and the balance was incurred for the purpose of a litigation:
Held, that the debt incurred was not illegal or immoral. **Tulsi Mahton v. Ojethru Lal** ... 43
- Mortgage**—Mortgagor vested with two rights—Chukdari and jotedari interests—Mortgage deed—What passes.
 When a mortgagor effects a mortgage of his interest in a *chuk*, in the absence of any express reservation, the presumption is that he gives by way of security all interest of whatever kind he possesses in the land.
 The words of a deed, executed for a valuable consideration, should be construed, as far as they properly may, in favour of the grantee. **Bhajahari Das Adhikari v. Bhagabati Dasi** ... 48
- Mortgage** bond executed in settlement of a substantial dispute between the parties. *see* Consideration ... 269
- Mortgage** deed—Interest, passing of—Mortgagor vested with two rights—Chukdari and jotedari interest; *see* Mortgage ... 48
- Mortgage** or conditional sale—Evidence Act (1 of 1872), Sec. 92—Surrounding circumstances—Value of property and consideration money, contrast between.
 In determining whether a transaction is a mortgage or a deed of absolute sale with a clause for repurchase, a Judge can take into consideration facts which may legitimately be proved with a view to showing in what manner the

Mortgage—(Contd.)

language of the documents was related to the existing facts and refer to the contrast between the value of the property and the consideration that passed in money. **Abdul Goffur v. Sheik Jamal** ... 225

Mortgage suit—Equity of redemption, purchaser of—Instrument, alteration of—Insertion of clause for compound interest—Material alteration—Burden of proof.

When a mortgagee seeks to hold the property in the hands of the purchaser of the equity of redemption liable for the mortgage debt, the latter is entitled to establish to the satisfaction of the Court that the conduct of the plaintiff has been such that no Court of equity will assist him. Hence the purchaser of the equity of redemption is at liberty to raise the question of the legality of the mortgage instrument.

Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument, either in its terms or the relation of the parties to it, is a material change, or, technically, an alteration, and such a change will invalidate the instrument against all person not consenting to the change.

Hence an addition of a clause for payment of compound interest without the knowledge and consent of the mortgagor is a material alteration of the instrument.

The principle on which the above rule is based is that no man shall be permitted, on grounds of public policy to take the chance of committing a fraud without running any risk of loss by the event, when it is detected, and that by the alteration the identity of the instrument is destroyed and to hold one of the parties liable under such circumstances would be to make for him a contract to which he never agree. The rule is not based upon any technical or peculiar features of English jurisprudence.

The burden lies upon the purchaser of the equity of redemption to establish that a clause for payment of compound interest was an alteration made subsequent to the execution of the instrument and without the knowledge and consent of the executant. **Achutanand Bhattacharji v. Ram Nath**

Bhattacharji ... 354

Mortgagee, if can question transferor's right, *see* Estoppel. ... 512

Mortgagee, if entitled to interest; *see* Mortgage ... 43

Natural Justice, principles of, violation of—Doubt as to innocence—conviction; *see* Criminal proceedings ... 365

Negligence—Loss of goods—Obstruction in erection of Kutchery; see Damages, suit for ... 327

Nimak Bayar Mahal, permanent settlement of; *see* Saltpetre, exclusive right to dig ... 151

Non-occupancy raiyat—Suit for ejectment—Lease—Expiration of term indicated in lease—Agricultural year, ending at some later date; see Limitation ... 597

Non-transferable holding—Mortgagee and purchaser of equity of redemption—Mortgagee, if can question transferor's rights; see Estoppel ... 512

Non-transferable occupancy holding—Transfer, effect of—Abandonment and Surrender—Sub-lease by raiyat, invalid—Under-raiyat's position—Bengal Tenancy Act, Secs. 85, 87.

The position of a landlord in a case of abandonment is stronger than in the case of a surrender by a raiyat. In the case of an abandonment, the landlord does not acquire any title through the raiyat as in the case of a purchase.

Non-transferable—(Contd.)

In the case of a non-transferable occupancy holding, where the raiyat sells the holding and quits possession of the lands, the lands become part of the *khass* lands of the landlord, and the holding does not continue to exist in such a case apart from the right of occupancy itself.

Section 87 of the Bengal Tenancy Act is not exhaustive.

Where a sub-lease by a raiyat is not binding on the landlord and the holding does not subsist after abandonment, an under-raiyat does not become a raiyat. **Pran Krishna Saha v. Muktya Sundori Dassya** ... 193

Non-transferable occupancy holding, sale of, effect of; *see* Non-transferable occupancy holding ... 193

Notice—Bengal Tenancy Act (VIII of 1885), Sec. 170, Sub-Sec. (3)—Third person applying to deposit money.

No order can be made so as to affect the interests of a party to the proceedings, till he has been afforded a reasonable opportunity to be heard in support of his case.

Notice should be given to the decree-holder, if an application to deposit money under sub-section (3) of section 170 of the Bengal Tenancy Act be made by the judgment-debtor, and to the decree-holder as well as to the judgment-debtor, if by a stranger to the proceedings. If either of them contests the right of the applicant to make the deposit, the question should be decided in their presence. **Ram Nath Maity v. Rudra Mahanti** ... 142

Notice, nature of—Revocation of agent's authority—Third person; *see* Lambardar ... 621

Notice, service of—Serving officer's return, value of—Certificate procedure; *see* Certificate Sale ... 628

Notice, sufficient—Objection as to entry in Settlement Roll—Civil Procedure Code (1908), sec. 80; *see* Settlement Rent Roll, entry in, correction of ... 566

Notice of claim—Service, how to be effected; *see* Railways Act, Secs. 77, 140 ... 147

Notice of claim—Service on Divisional Traffic Manager of a Railway Company, if sufficient; *see* Railways Act, secs. 77, 140 ... 147

Notice of motion, leave to amend, when can be given; *see* Contempt of Subordinate Criminal Court ... 452

Novation—Contract Act, Sec. 62—Acknowledgment of obligation by third person in favour of plaintiff.

Where a sum is payable by A. B. for the benefit of C. D., C. D. can claim under the contract as if it had been made with himself.

On the 22nd July, 1899, defendants Nos. 1 to 4 borrowed from the plaintiff a certain sum and by way of security, for this, they gave a personal covenant by a registered bond and also purported, though ineffectually, to create a charge, by deposit of a *potta* relating to immovable property. Interest was paid on this bond upto the 13th April, 1903; and, on the 18th August 1903, defendants Nos. 1 to 4 executed a registered instrument of transfer of all their property, moveable and immovable, to defendant No. 5. There was a provision and a declaration in the *khobala* that out of the consideration money amongst other things, amount due to the plaintiff should be paid by defendant No. 5. On the very same day, there was an arrangement between the plaintiff and defendant No. 5 by which the liability of defendant No. 5 under the transfer was acknowledged and accepted, and either then or in connection therewith the *potta* was handed over to defendant No. 5.

Novation—(Contd.)

Held, that there was no novation within the meaning of section 62 of the Indian Contract Act.

That as the amount due to the plaintiff was allocated and held by defendant No. 5 for the benefit of the plaintiff, the latter was entitled to enforce his claim. **Deb Narayan Dutt v. Ghuni Lal Ghose** ... 603

Occupancy, right of, if can be acquired under a trespasser—Rent Recovery Act; *see* *Hikimali* tenure ... 23

Occupancy raiyat—Purchase of Superior permanent tenure, effect of; *see* Under-raiyat, if raised to raiyat ... 263

"Opinion of the Sessions Judge and of the Jury"—Criminal Procedure Code, Sec. 307, Cl. (c); *see* Reference, validity of ... 312

Order, if can be made—Order affecting interests of parties; *see* Notice ... 142

Order allowing decree-holder to withdraw, execution proceedings if appealable; *see* Decree, execution of ... 53

Order directing sale of occupancy holding passed in insolvency proceeding, validity of—Provincial Insolvency Act, Sec. 16—contention as to exemption from attachment and sale; *see* Provincial Insolvency Act, Secs. 16, 20, 46(3) ... 564

Order dismissing application on ground of limitation; *see* Appeal ... 264

Order refusing to oppose; *see* Appeal, if lies ... 612

Order refusing temporary injunction—Civil Procedure Code, O. XXXIX, R. 1; *see* Appeal ... 39

Orphan, married, adoption of—Agarwal Banias of Zira in the Punjab—Custom; *see* Hindu Law—Adoption ... 70

Oudh Law—Joint family property—Partition—Oudh Estates Act (1 of 1869), Secs. 2, 3 and 8—Talukdar—Estate—Summary Settlement—Impartibility—Talukdari tenure and acquisitions, succession in.

An order sanctioning the summary settlement of Government revenue in respect of 9 villages in Oudh with one A, as *malguzar*, was passed on the 5th October 1853, but the *habuliat* was not signed by him until the following 13th, and in the first regular settlement 6 more villages were decreed to him. A's name was entered in the first and second lists prepared under section 8 of the Oudh Estates Act:

Held, that the summary settlement was in fact made on the 5th October 1859, which was between the two dates given in section 3 of the Act and the right which A acquired by the order of that date, was not affected by the delay in signing the *habuliat*, the execution of which on the following 13th related back to the former date.

Held, also, that A was a talukdar and the said villages constituted an 'Estate' within the meaning of section 2 of the Act and were consequently impartible.

Held, further, that the question whether properties acquired by an Oudh 'talukdar' became part of his '*taluka*' for the purpose of his succession depended on his intention to incorporate the acquisitions with the '*taluka*.' In the absence of such an intention, the ordinary rule of succession of the Hindu Law applied. **Bhaiya Janki Pershad Singh v. Bhaiya Dwarka Pershad Singh** ... 200

Parties to appeal—Appeal by one of defendants—Sult, dismissal of—second appeal by plaintiff; *see* Civil Procedure Code (1908), O. 41, R. 4 ... 621

Partition—Joint family property—Oudh Estates Act, Secs. 2, 3, 8—Estate—summary settlement—Impartibility; *see* Oudh Law ... 200

Partition , if can be impeached—Ancestral property—Partition by father—Minor sons—share given to stranger— <i>Bona fide</i> compromise of disputed claim; <i>see</i> Hindu Law—Partition	237
Partition , instrument of, calling, will, effect of; <i>see</i> Hindu Law—Partition	57
Partition , instrument of, stated as will—Provision for forfeiture In case of bad behaviour, effect of; <i>see</i> Hindu Law—Partition	57
Partition , suit for— <i>Plots belonging to some co-sharers</i> . Plots belonging to some and not to all the co-sharers, cannot be brought into hotchpot in a suit for partition. Ramtaran Nag Mazumdar v. Hari Charan Nag Mazumdar	354
Partition by father, if binds minor sons—Share given to stranger—Partition, if can be impeached— <i>Bona fide</i> compromise of disputed claim; <i>see</i> Hindu Law—Partition	237
Partition by head of Mitakshara family carried into effect—Calling instrument of partition a will—Family arrangement; <i>see</i> Hindu Law—Partition	57
Partition by will—Head of the family, power of, <i>see</i> Hindu Law—Partition	57
Partition suit—exclusive possession by any party—Court's power to appoint Receiver pending hearing; <i>see</i> Receiver	638
Partnership business , claim for a share of— <i>Dissolution—Evidence—Accounts—Presumption—Conduct of parties—Limitation—Indian Limitation Act (XV of 1887) Sch. II, Art. 106</i> . Where in a suit brought in 1902 for a share in a partnership business it was proved that since the establishment of the Partnership in 1868 down to 1891 annual accounts suitable as those of a current partnership business were regularly rendered between the contending parties, and that those accounts entirely ceased in 1891 in which year the account furnished was a capital account showing a complete division of the partnership shares: <i>Held</i> , that the presumption was for dissolution in 1891; that the fact that the subsequent conduct of the parties was consistent only with dissolution put it beyond doubt that the partnership was dissolved in 1891; and that the suit was barred by the three years' limitation provided by the Indian Limitation Act Sch. II, Art. 106. Joopoody Sarayya v. Pulavarti Lakshmana-swamy	13
Party to suit, if and when can be appointed Receiver; <i>see</i> Receiver	638
Party's right to know who applied, <i>see</i> Contempt of subordinate criminal Court	452
Patta dated sometime before Permanent settlement found false—Rent, sixty of; <i>see</i> Presumption	193
Penal Code , Sec. 365—Complaint as to previous incident, admissibility of; <i>see</i> Evidence, admissibility of	578
Penal code , Sec. 365—Proof necessary; <i>see</i> Evidence, admissibility of	578
Penal code , Sec. 365—Evidence of previous incident, if admissible; <i>see</i> Evidence, admissibility of	578
Penalty —Lease, construction of—Agreement, non-performance of—Agreement not to take particular defence.	

Where in a lease granted for a term of years at a certain rate, it was provided that the tenant should give up the land on the expiry of the term and if, upon the

Penalty—(Contd.)

expiry of the term, he claimed a right of occupancy or caused a claim to be put up by any other person, he would be liable, while holding over, to pay higher rent.

Held, that the clause as regards payment of higher rent, being in the nature of a penalty, was not enforceable. **Mir Abdul Aziz v. Karu** ... 95

Permanent Settlement, effect of—Assets of estate settled—English real property law, *see* Saltpetre, exclusive right to dig ... 151

Permanent tenure; *see* Taluk ... 271

Plaintiff, death of—Dismissal for default—Substitution, application for, if proper; *see* Suit, maintainability of ... 9

Plaintiff's title admitted—Defendant claiming subordinate interest derogatory to that title; *see* Burden of proof ... 544

'Plantation'—*Betel-leaf—Protected interest—Bengal Tenancy Act, Secs 160, 167—'Date of sale.'*

The word 'plantation' in section 160, cl (c), of the Bengal Tenancy Act, is one of wide significance and includes an assemblage of growing plants of any kind that have been planted. Whether or not a particular assemblage of plants comes within this, is largely, if not exclusively, a question of fact. A betel-leaf *boraj* may be a 'plantation' within the meaning of section 160.

Per N. Chatterjee J.—The words 'date of sale' in section 167 of the Bengal Tenancy Act mean the date on which the sale is confirmed. **Banko**

Behari Das v. Krishna Chandra Bhowmick ... 170

Pleader's fee, assessments of—Costs—General Rules and Circular Orders of the High Court, Appellate Side, Vol. I. Chap. VI. Rules 36A, 42A, Chap. X, Rule 26—Probate and Administration Act, Sec. 83; *see* Probate proceeding ... 643

Plots belonging to some co-sharers; *see* Partition, suit for ... 556

Poolbundi charges—*Putni lease—Contract—Apportionment of charge by Collector—*

Contractual right, if can be enforced—Suit for declaration and injunction, if maintainable—Contract, if valid—Bengal Embankment Act, Secs. 54, 56, 59, 68, 69, 74—Embankment Act at the time of contract, repeal of.

The Collector has no power under the Bengal Embankment Act to take away from the *putnidar*, the benefit of any contractual right which he had against the *zemindar* and the *putnidar* is entitled to come to the civil Court for the purpose of having his contractual rights vindicated.

There was a stipulation in the *putni* lease that the *zemindars* should pay the *poolbundi* cesses. Embankment charges were assessed by the Collector under the Bengal Embankment Act, 1882 and had been apportioned on the *putnidars*. The *putnidars* brought a suit for a declaration that they were not bound to pay those charges and that the orders of the Collector could not be enforced and for an injunction against the *zemindars* from realising those charges from them:

Held, that the suit was maintainable, as there was reason to apprehend the breach of the contract on which the plaintiff relied.

The *poolbundi* charge in the case was so similar to that which would have been in existence at the time of the *putni* lease in 1870 that it was within the intention of the parties to include such *poolbundi* and it would be fair to extend the agreement to the particular charge arising under the Act of 1882.

There is nothing in the Act of 1832 that would render the agreement contrary to the policy of the law or void for any other reason. **Siba Prasad**

Samanta v. Gossain Das Dutt ... 337

Poolbundi charges , contract to pay, by zemindar—Embankment Act at the time of contract, repeal of—Contract, if can be enforced, <i>see</i> Poolbundi charges	337
Poolbundi charges , contract to pay, by zemindar—Putal lease—Apportionment of charge by Collector—Bengal Embankment Act, Sec. 54—Contractual right, if can be enforced; <i>see</i> Poolbundi charges	337
"Positive evidence" , what is; <i>see</i> Contempt of subordinate criminal Court	452
"Possession" — <i>Constructive possession</i> —Bengal Excise Act, Secs. 2(12), 46, 46(a), 52, 61—Criminal Procedure Code, Secs. 236, 237.	

The petitioner was in possession of an invoice and bill of lading which purported to cover old wearing apparel exported by Porter & Co. of London to Rasu Prosad at Darjeeling. The bill of lading with endorsement by Porter and Co., and Rasu Prosad were made over by the accused to Cox & Co., in order that the goods might be cleared and passed through the Customs House. The goods were found to contain a large quantity of cocaine which was sought to be illicitly exported in contravention of the provisions of the Excise Act. The accused, when apprised of the discovery, professed to be acting on behalf of Rasu Prosad.

Held, that the accused committed an offence falling under section 61 read with section 46, clause (a) and section 2, cl. (12) of the Bengal Excise Act, of attempting to bring cocaine into Bengal in contravention of the provisions of the said Act and not under sections 46 and 53, as he could not be said to be in "possession" of the cocaine.

The doctrine of constructive possession is to be very cautiously applied specially in the department of criminal jurisprudence.

Sections 236 and 237 of the Code of Criminal Procedure applied. **Kali**

Charan Mookerjee v. Emperor 514

Possession, suit for—Regulation III of 1828, Sec. 4—Collector, what decides—Grant for maintenance—'Ba farzand'—'Ba walad'—Regulation XXXVII of 1793, Sec. 15—Regulation XIV of 1825, Sec. 3.

The only question within the competence of the Collector to decide under section 4 of Regulation III of 1828 is, whether the land is or is not liable to be assessed with revenue.

Grants for maintenance are, *prima facie*, resumable upon the death of the grantee. But this is not an inflexible rule of law.

Where a grant has been made whereby property is vested in the grantee and his descendants by appropriate terms sufficient to create an hereditary estate, that hereditary estate is not cut down and made inalienable merely by a direction that certain persons were to be maintained.

The term *ba farzand*, which is equivalent to the expression *mai farzand*, means 'with offspring,' 'with children,' it is a term inserted in a grant which is made to the grantee and his posterity; it is in fact equivalent to the expression *ba walad*, and the expression applies to heirs and descendants generally, although according to the derivative meaning it denotes only the children of the grantee or his heirs in direct line of descent.

In so far as a *madadnash* grant is made hereditary by section 15 of Regulation XXXVII of 1793, it is in no way affected by clause (3) of section 3 of Regulation XIV of 1825. This latter provision simply lays down that the burden lies upon the person, who asserts a claim of this description against the State, to establish that the claim is well-founded. **Secretary of State for India in Council v. Rashidul Huq**

Preamble—Enacting.

A preamble of an Act does not govern clear expressions in the enacting part. *Keshab Panda v. Bhubani Panda* ... 187

Preliminary decree, appeal against—Final decree, passing of, before filing of appeal—Appeal, effect of; *see* Appeal, if lies ... 321

Preliminary decree, appellate Court's jurisdiction to set aside—Final decree passed pending appeal against preliminary decree, *see* Final decree ... 209

Preliminary decree, setting aside of, effect of—Final decree passed pending appeal against preliminary decree; *see* Final decree ... 209

Presumption—Grant of inheritance—Usage—Descent from father to son; *see* Jagir ... 277

Presumption—Raiyat holding at fixed rate—Bengal Tenancy Act, Secs. 50(2), 106—Unexplained variation—Alteration in rate of rent, if variation—Record of rights, entry in.

An entry in the record of rights is presumed to be correct till the contrary is shown.

Where the tenants have established that since 1832 they have been in occupation of certain quantity of land and have paid rent for the same at a certain rate, the statutory presumption mentioned in sub-section (2) of section 50 of the Bengal Tenancy Act arises. An unexplained small variation is not sufficient to rebut the presumption.

A mere alteration in the rate of rent will not prove a variation unless it be shown that the tenant submitted to that varied and enhanced rate. *W. M.*

Grant v. Harsahal Singh ... 76

Presumption—Rent free—'Belagan', entry of, in settlement record—'Kabillagan'—'Lakheraj'.

The entry *belagan* in a settlement record, while it may be indicative of a *tenure*, also shows that no rent in fact was paid, and makes no pronouncement either way as to liability to pay rent.

The expression '*Kabillagan*' describes a tenancy for which rent is not actually paid but which is liable to pay rent.

The word *lakheraj* is often used loosely, in strictness, it indicates a freedom from liability to revenue, but it is constantly used as indicating exemption from liability to pay rent.

A Court may, from evidence of long and uninterrupted possession without payment of rent, presume a grant of land under conditions which make it rent-free, though it may not be revenue free. *Keshwar Bhagat v. Sheo*

Prasad Lal ... 166

Presumption—Rent, fixity of—Long payment of rent at uniform rate—*Potta* found false.

It is open to the Court, apart from the provisions of section 50 sub-section (2) of the Bengal Tenancy Act, to draw an inference as to a *jote* having been held at a fixed rent from the Permanent Settlement from the fact of long payment of rent at a uniform rate.

Per N. Chatterjee J.—Where the *potta* dated sometime before the Permanent Settlement filed by the tenant to prove fixity of rent, was found to be false.

Held, that the tenant was not precluded from asking the Court to draw an inference as to the fixity of rent, if he proved other facts which could give rise to such an inference. *Pran Krishna Saha v. Mukta Sun-*

dary Dassya ... 193

Presumption of jointness —Separate entries in the revenue records—Inference from acts of the members; <i>see</i> Hindu Law—Presumption	234
Previous incident, complaint as to, admissibility of —Penal Code, secs. 365, 366; <i>see</i> Evidence, admissibility of	578
Principal and agent —Authority conferred by two or more principals—Authority, if can be revoked by one; <i>see</i> Lambardar	621
Private rights, existence of —Hunter's Statistical Accounts, statements in, reference to, validity of; <i>see</i> Fishery right	399
Privy Council appeal —Appeal against preliminary decree—No appeal against final decree; <i>see</i> Document, printing of	122
Privy Council appeal —Documents irrelevant to subject matter of appeal—High Court Rules, Appellate side, Rule 17; <i>see</i> Document, printing of	122
Probate and Administration Act, Sec. 83 —Pleader's fee, assessment of—Costs—General Rules and Circular Orders of the High Court, Appellate side, Vol. I, Chap. VI, Rules 36A, 42A, Chap. X, Rule 26; <i>see</i> Probate proceeding	643
Probate proceeding —Costs—Pleader's fee, assessment of—General Rules and Circular Orders of the High Court, Appellate Side, Vol. I—Chap. VI, Rules 36A, 42A—Chap. X, Rule 26—Probate and Administration Act, Sec. 83. In awarding costs in a probate proceeding the pleader's fee is to be assessed under rule 42A of Chapter VI of the General Rules and Circular Orders of the High Court, Appellate Side, and not according to the valuation of the property covered by the probate. Baijnath Prasad Singh v. Sham Sunder Kuer	643
Promise to pay barred debt —Promise in writing and signed by debtor—Knowledge of debt barred, if necessary—Contract Act, Sec. 25, cl. (3). A promise to pay a barred debt made in writing and signed by the person charged therewith is enforceable. It is not necessary for the creditor to establish that at the time when the promise was made by the debtor, the debtor knew that the debt which he promised to pay wholly or in part was a debt of which the creditor could not enforce payment by reason of the law for the limitation of suits. Bhowani Misser v. Pearl Jha	329
Provincial Insolvency Act, Sec. 16 —Order directing sale of occupancy holding passed in insolvency proceeding, validity of—Contention as to exemption from attachment and sale; <i>see</i> Provincial Insolvency Act, Secs. 16, 20, 46 (3)	564
Provincial Insolvency Act, Secs. 16, 20 and 46 cl. (3) —Appeal—Leave by the District Court—Occupancy holding, transferability of—Holding, whether saleable or not—Judgment-debtor, whether entitled to a decision before sale—Sale without such decision, whether valid.	

It is proper that leave to appeal under section 46 cl. (3) of the Provincial Insolvency Act should be given by the District Court when the order complained of is one finally deciding a question in controversy between the parties.

An order passed in the course of proceedings under the Insolvency Act, directing the sale of certain holdings, which were said to be occupancy holdings, at the risk of the purchaser in case the custom of transferability was denied by the landlord, without ascertaining whether the contention of the judgment-

Provincial Insolvency Act—(Contd.)

debtor that the property was exempted by the Code of Civil Procedure from liability to attachment and sale within the meaning of section 16 of the Act was well founded or not, was illegal, and the sale was liable to be set aside. It was perfectly open to the insolvent judgment-debtor to raise the contention, and he was entitled to a decision on the point in controversy between the parties, *i.e.* whether or not the property was saleable. **Arman Sardar v.**

Satkshira Joint Stock Company Limited 564

Provincial Insolvency Act, Sec. 22—'Person aggrieved'—Loss of benefit; *see* Insolvency proceeding 359

Provincial Insolvency Act, Sec. 46, cl. (3)—Leave to appeal, by whom to be given—Order deciding a question in controversy between the parties; *see* Provincial Insolvency Act, Secs 16, 20, 46 (3) 564

Public Demands Recovery Act, sale under, what passes; see Certificate sale 628

Public Demands Recovery Act, Sec. 10—Notice, non-service of, effect of, on judgment-debtor—Judgment-debtor's right; *see* Certificate sale 628

Public prosecutor—Legal Remembrancer of Bengal, appeal by—Government of Bihar and Orissa—Acquittal, order of—Criminal Procedure Code, Sec. 417.

The mere fact that a person has been directed to present an appeal to the High Court from an order of acquittal does not involve his appointment as public prosecutor for the purposes of the case. In a case of this description, where the liberty of the subject is involved, an appeal is sought to be preferred against an order of acquittal, the statute must be strictly construed, and full compliance with its provisions are required. **Emperor v. Gaya**

Prasad 519

Purchaser, remedy of—Adjudgment as insolvent—Purchase of insolvent's property before adjudgment—Property advertised for sale by Receiver; *see* Insolvency proceeding 359

Purchaser at a sale under Public Demands Recovery Act, what obtains; see Certificate sale 628

Purchaser of equity of redemption, if can raise the question of legality of mortgage instrument; see Mortgage suit 354

Purchaser of portion of tenure not made party—Decree, if binding; see Taluk 271

Putni Regulation, Sec. 11, cl. (3)—'Resident and hereditary cultivator'—Proposed grant of *miras* rights by *darputnidar*; *see* Ejectment, suit for 334

Putni tenure—Sub-division—Rent receipts showing shares of tenants and rent.

Where the shares of the tenants in the *putni* as well as those of rent payable by each in his own share are separately shown in the rent receipts granted to several tenants.

Held, that the rent payable by different tenants is distributed amongst them and that there is a sub-division of the tenure consented to, by the landlord. **Abinash Chandra Chowdhury v. Purnananda Khan** 174

Question of law—Facts establishing custom; see Custom 559

Railways Act, Secs. 77, 140—Railway company—Damage of goods delivered—Notice of claim to compensation—Divisional Traffic Manager, notice on, whether sufficient.

A notice of claim in respect of goods delivered in a damaged condition by a Railway Company must be served as provided by sections 77 and 140 of the Railways Act.

Where, therefore, a notice of claim was served on the Divisional Traffic Manager of a Railway Company, and not on the Agent in India of the Company, the service was not a sufficient compliance with the provisions of the Act, and the suit subsequently brought against the Railway Company for compensation was liable to be dismissed inasmuch as the plaintiff in the action did not comply with the condition precedent to his suit. **East Indian Railway Company v. Babu Madho Lal** ... 147

Raiyat at fixed rate, if can claim occupancy right—Hindu widow executing permanent lease—Lease declared invalid.

A person who claims the higher status of a raiyat at fixed rate can, if that claim is disallowed, fall back upon and establish, if he can, the lower status of an occupancy raiyat.

Where, therefore, a permanent lease was granted by a person, who had only a life interest in the land, and the lease was afterwards declared invalid, the lessee having been in possession for more than 12 years, although he claimed to be a raiyat holding at a fixed rate, could acquire the lower right of a mere occupancy raiyat. **Iohhamayi v. Kailas Chandra Mukerjee** ... 536

Raiyati interest—Land not agricultural or horticultural—Garden not permanent—Act VII (B. C.) of 1868, Secs. 12, 14.

Where the land is not agricultural or horticultural, no raiyati interest can be created in it.

Gardens which are not permanent are not protected from annulment under section 12 of Act VII (B. C.) of 1868. **Chandra Kumar Aich v. Chaitanya**

Charan De ... 232

Rateable distribution—Civil Procedure Code, Secs. 73, 115—Fraudulent decree—Summary enquiry—Acting with material irregularity—Decision based on evidence not taken in accordance with law—Evidence Act, Sec. 165.

An execution Court has jurisdiction under section 73 of the Code of Civil Procedure to hold a summary enquiry as to fraudulent character of a decree obtained by one of the decree-holders claiming rateable distribution.

A Court acts with material irregularity in the exercise of jurisdiction, when its decision is based upon evidence not taken in accordance with law.

An examination of a witness by a Court should not take place without notice to the parties or their pleaders and without affording any opportunity to cross-examine him or to rebut his statement. Section 165 of the Evidence Act does not justify such a procedure. **Peary Lal Das v. Peary Lal**

Dawn ... 646

Rateable distribution—Money deposited under O. XXI, R. 89 of the Code of Civil Procedure; see Civil Procedure Code (1908), Sec. 73, scope of ... 144

Receiver—Partition suit—No exclusive occupation by one party—Courses open to Court in appointing Receiver—Party to suit, if and when can be appointed Receiver.

A Court has jurisdiction to appoint a Receiver until the hearing of a partition

Receiver—(Contd.)

suit or until further order, even though there is no exclusive occupation by any party, and the Court will not hesitate to do so whenever it is just and convenient. The case for the appointment of a Receiver is much stronger, if a party to the partition action is in sole occupation; In such a case, any of the party may obtain a Receiver either of his share of the rents and profits or of the whole estate. In cases of this description there are four alternative courses open: (1) the Court may require security from the person in sole occupation; (2) the Court may require him to pay occupation rent; (3) the Court may appoint a Receiver of the share of the plaintiff or (4) the Court may appoint a Receiver of the entire estate.

One of the parties to a litigation should not ordinarily be appointed a Receiver and very exceptional circumstances must be established to justify the appointment of a party as Receiver. **Suprasanna Roy v. Upendra**

Narain Roy ... 638

Receiver, appointment of—Courses open to Court; *see* Receiver ... 638

Receiver appointed under Provincial Insolvency Act, position of *see* Insolvency proceeding ... 359

Receiver appointed under Provincial Insolvency Act, acting in excess of authority—Stranger, remedy of—Court's inherent power; *see* Insolvency proceeding ... 359

Record of Rights—Dispute as to entry—Bengal Tenancy Act, Sec. 106.

Where a settlement of land revenue is not being or is not about to be made, a dispute as to an entry in the record of rights, though arising under Part I of Chap. X of the Bengal Tenancy Act, is a matter that can be decided under section 106.

Keshab Panda v. Bhobani Panda ... 187

Record of Rights, entry in; *see* Presumption ... 76

Redemption, right of; *see* Rule against perpetuities ... 228

Reference, validity of—'Opinion of the jury'—*Criminal Procedure Code*, Sec. 307, cl. (c).

The expression "opinion of the Sessions Judge and of the jury" in clause (c) of section 307 of the Code of Criminal Procedure, is equivalent to "opinion of the Sessions Judge and verdict of the jury." **Emperor v. Tarapada**

Naskar ... 522

Reference to arbitration—Consent of person having no authority to act on behalf of guardian of infant—Guardian-*ad-litem*, if can apply to set aside award—Limitation Act (1877) Sch. II. Art. 158; *see* Appeal ... 35

Registrar's power to revive—Application struck off—Non-appearance or failure to prosecute; *see* Document, registration of ... 45

Registration Act, Sec. 77—Time, running of—Order of refusal—Application struck off—Order on review; *see* Document, registration of ... 45

Regulation I of 1793, Sec. 10 ... 526

Regulation VIII of 1793, Sec. 5 ... 526

Regulation XXXVII of 1793, Sec. 15 ... 31

Regulation I of 1801, Secs. 8, 14 ... 526

Regulation I of 1801, Secs. 14, 8 ... 526

Regulation V of 1812, Sec. 3—Patta executed in 1874—Stipulation for payment of *Salam* and *shwari*—Part of Rent—"A definite clause in the engagement contracted between the parties"; *see* Abwab ... 83

Regulation VIII of 1819, Sec. 11 cl. (3) ... 334

Regulation XIV of 1825, Sec. 3 cl. (3)	31
Regulation III of 1828, Sec. 4—Collector, what can decide; see Possession, suit for	31
Rejection of a story designedly made to fit into another, effect of; see Criminal proceedings	365
Reliable evidence, want of—Evidence of adequate motive strong and convincing; see Criminal proceedings	365
Relief, nature of, to be granted—Suit to set aside father's alienation of ancestral property—Equity between father and his alliance; see Hindu law—Partition	237
Remand—Appellate Court, powers of—Inherent power—Error or irregularity not affecting merits—Civil Procedure Code (1908), Secs. 99, 107 cl. (1), Sub-cl. (b). O. XLI, R. 23, 25.	
A Court of appeal has the power to remand a case only under section 107 and Order XLI. Rules 23 and 25 of the Code of Civil Procedure, and has no inherent power to remand the same even when the original Court, "has committed any error, omission or irregularity by reason of which there has not been a proper trial or an effectual or complete adjudication of the suit, and the party who complains of such error, omission or irregularity, has been thereby materially prejudiced"	
Having regard to the provisions of section 99 of the Code of Civil Procedure, High Court treated an error of law made by the lower appellate Court in the present case as an irregularity, and inasmuch as the said error did not at all affect the merits of the case, it refused to interfere. Habin Chandra Tripathi v. Kali Kumar Das ...	
Remand order—Application for setting aside of sale—Civil Procedure Code (1908), Sec. 47; see Appeal	264
Remand order—Order deciding suit not barred under Sec. 91 of the Chota Nagpur Tenancy Act—Interlocutory order—Civil Procedure Code (1908), Sec. 102; see Leave to appeal to Privy Council	124
Rent, acceptance of, effect of—Invalid grant; see Hihimali tenure	23
Rent, additional, for excess land—Plaintiff to prove what; see Hindu widow...	633
Rent, enhancement of—Settlement for term on nominal rent—Less rent payable during term—Rent payable—Nominal rent mentioned payable after term—Bengal Tenancy Act, Sec. 29, cl. (b).	
The provision of Section 29 cl. (b) of the Bengal Tenancy Act applies not only to contracts executed at the time of the enhancement but to contracts executed some years before.	
A <i>kabuliat</i> for a term of years began with a tabular statement, which showed the rent to be Rs. 57-4as. in all. Out of this, the sum of Rs. 17-2as. was remitted for some unexplained reason, and the remaining rent was fixed at Rs. 40-2as. for the period of the <i>kabuliat</i> . The <i>kabuliat</i> , after the tabular statement, went on to describe the rent as being Rs. 40-2as. during its terms, and contained a stipulation that, at the end of the term the tenant would take a settlement at the rate of Rs. 57-4as. and if he did not, the landlord would be entitled to realise the rent by suit.	
<i>Held</i> , that the <i>kabuliat</i> was an attempt to evade the provisions of section 29 cl. (b) of the Bengal Tenancy Act; that at the end of the term, the tenant's rent could not be enhanced so as to exceed by more than 2 annas in the rupee the sum of Rs. 40-2as. Srimati Mahamaya Kar v. Kishore Chang ...	
Rent, fixity of—Long payment of rent at uniform rate—Patta false; see Presumption	193

Rent, reduction of, by Hindu widow, for services rendered to her, if binds reversioner, *see* Hindu widow ... 633

Rent, suit for—*Agreement, registered—Agreement to convert after expiry of lease, money rent into rent in kind, if an enhancement and enforceable—Bengal Tenancy Act, Secs. 29, 43.*

The conversion of cash rent into rent in kind cannot be regarded as enhancement within the meaning of section 29 or section 43 of the Bengal Tenancy Act.

Where it was agreed that if the tenant should continue in occupation after the expiry of the term of the lease, he would pay rent in kind.

Held, that the agreement was not objectionable and could be enforced.

Gobind Mander v. Banarsi Prasad ... 74

Rent, suspension of—*Tenant, dispossession of—Dispossession.*

When a landlord dispossesses a tenant from his holding or a part of his holding, rent is suspended so long as the eviction exists. It is not necessary that the landlord should with his own hand physically turn out the tenant; it is enough if he is a person of whom it can fairly be said that he dispossessed the tenant. **Godai Molla v. Aminuddi Howladar** ... 509

Rent, variation of—*Alteration in rate of rent—Submission; see Presumption* ... 76

Rent decree, execution of—*Purchase by decree-holder in execution of money decree subject to rent charge, effect of.*

A landlord, who purchases the defaulting tenure in execution of his money decree subject to rent charge, cannot execute his decree for rent as the judgment-debt in his favour for rent is extinguished.

A decree-holder who has obtained a decree for rent is free to proceed against any property of the judgment-debtor; he is under no obligation to proceed in the first instance against the defaulting tenure. **Sailaja**

Prasad Chatterjee v. Gyani Das ... 29

Rent free grant—Long and uninterrupted possession without payment of rent; *see* Presumption ... 166

Resident and hereditary cultivator—*Professed grant of miras right by dārpatnidar—Putni Regulation, Sec. 11 cl. (3); see Ejectment, suit for* ... 334

Restrictive order for admission of criminal appeal, if valid; *see* Criminal Procedure Code, Sec. 422 ... 582

Retrospective effect of statute—Cause of action, *see* Dispossession ... 274

Revenue officer specially empowered, when exercises a power of review; *see* Revenue officer's power to revise ... 125

Revenue officer specially empowered, when exercises revisional power; *see* Revenue officer's power to revise ... 125

Revenue officer's power to revise—*Bengal Tenancy Act, Sec. 108, scope of—Consent and ex parte decree—Appeal.*

The terms of section 108 of the Bengal Tenancy Act are very comprehensive and the Legislature has not prescribed any restriction as to the class of questions which may be considered by the specially empowered revenue officer or as to the mode in which his jurisdiction is to be exercised. A specially empowered revenue officer is invested under section 108 with what may be described as power to review on the merits his own order or revise the orders made by another officer. If he reconsiders an order made by himself, he exercises a power of review; if, on the other hand, he examines the propriety of an order made by another revenue officer, he exercises revisional powers.

Revenue officer's—(Contd.)

Where consent decrees have been made or decrees have been made *ex parte* against absent defendants, their propriety is liable to be examined by an officer specially empowered in that behalf under section 108 of the Bengal Tenancy Act.

An order under section 108 of the Bengal Tenancy Act is liable to be challenged by way of appeal under sub-section (2) of section 109A.

Parbati v. Tulsi Koeri ...	125
Revenue sale—Co-sharer in property, duty of—Co-sharer's wilful default in paying Government revenue; see Fraud ...	97
Revenue sale—Default of co-owner—Defaulting co-owner purchaser—Defaulting co-owner, if trustee; see Fraud... ...	97
Revenue sale—Share in arrear—Estate not in arrear—Revenue Sale Law, Sec. 13—“Estate”—Defaulter, if to show erroneous debit—Collector's jurisdiction to sell.	
The term ‘estate’ as used in the clause “if the estate shall become liable to sale” in section 13 of the Revenue Sale Law, means the entire estate out of which the separate share has been carved.	
If the estate as a whole has become liable to sale for arrears of revenue, the question arises which portion or portions thereof should be brought to sale. Under section 13 of the Revenue Sale Law the Collector can put up to sale only that share or those shares of the estate, which has thus become liable to sale for arrears of revenue, from which, according to the separate accounts, an arrear of revenue may be due.	
If the estate is not liable to sale for arrears of revenue, the Collector has no jurisdiction to put up any share thereof to sale.	
It is not obligatory upon the defaulter to show how the erroneous debit in the Collector's book originated. Indramani Dasya v. Priya Nath Chakravarti ...	
Revenue Sale caused by default of co-owner—Defaulting co-owner, purchaser—Purchaser, if trustee for other co-owner; see Trustee... ...	111.
Revenue Sale Law, Sec. 7—Irregularity—Sale notification—Error as regards specification of shares immaterial; see Fraud ...	97
Revenue Sale Law, Sec. 13—“Estate”—“If the estate shall become liable to sale”—Separate share; see Revenue sale ...	505
Revision—Civil Procedure Code (1908), Sec. 115—Acting with material irregularity in exercise of jurisdiction—Decision based on evidence not taken in accordance with law; see Rateable distribution ...	646
Revision—Error of law—Irregularity—Error not affecting merits of case—Civil Procedure Code (1908), Sec. 99; see Remand ...	613
Revision by High Court—New trial on question of fact—Full Court of Small Cause Court; see Civil Procedure Code (1908), Sec. 115 ...	594
Revocation of Agent's authority by one principal—Authority conferred by two or more principals jointly; see Lambardar ...	621
Revocation of Agent's authority—Third person—Notice, nature of, see Lambardar ...	621
Revocation of Agent's authority, when takes place as regards third persons; see Lambardar ...	621
Revocation of Agent's authority, third person's knowledge of—Burden of proof; see Lambardar ...	621

Revocation of Agent's authority, when takes place; <i>see</i> Lambardar ...	621
Rights , forfeiture of, for default in procedure, principle of; <i>see</i> Sult , maintainability of ...	9
Right of occupancy, acquisition of—Occupation given by temporary intermediate holder; <i>see</i> Hikimali tenure ...	23
Right of occupancy, if can be acquired under a trespasser—Rent Recovery Act; <i>see</i> Hikimali tenure ...	23
River bed , what is, <i>see</i> Fishery right ...	399
Road cess return, admissibility of—Road cess return filed by Hindu widow, if binds reversioner, <i>see</i> Hindu widow ...	633
Road cess return filed by Hindu widow, if admissible in favour of reversioner—Evidence Act, Sec. 32 cl. (3); <i>see</i> Hindu widow ...	633
Rule , if can be issued in favour of dead person—Rule, if issued, effect of; <i>see</i> Jurisdiction ...	141
Rule against perpetuities — <i>Redemption, right of</i> A mortgagor's right of redemption is exempt from the operation of the rule against perpetuities. Abdul Goffur v. Sheikh Jamal ...	225
Salami and tehwarl , stipulation for payment of—Part of rent—"A definite clause in the engagement contracted between the parties"—Regulation V. of 1812, Sec. 3—Patta executed in 1874; <i>see</i> Abwab ...	83
Sale , if invalidated—Judgment-debtor, death of, after attachment and before sale—Legal representative not brought on record; <i>see</i> Certificate sale ...	628
Sale, setting aside of — Bengal Tenancy Act (VIII of 1885), Sec. 174—Application, time for, if can be extended—Fraud of execution-creditor—Limitation Act. (IX of 1908), Sec. 18—Jurisdiction. As section 18 of the Indian Limitation Act has no application to a proceeding under section 174 of the Bengal Tenancy Act, a judgment-debtor cannot get an extension of time for filing application for setting aside of sale under the said section of the Bengal Tenancy Act, on the ground of fraud on the part of the execution-creditor. When a sale has taken place and no ground has been established for its reversal in accordance with statutory provisions, there is only one duty incumbent upon the Court, namely, to confirm the sale in so far as the parties to the proceeding and the auction-purchaser are concerned, and, if the Court, under these circumstances, refuses to give effect to the sale, it fails to exercise a jurisdiction vested in it by law, namely, to confirm the sale, and, exercise a jurisdiction not vested in it by law, namely, to cancel a valid and operative sale. Radhasyam Kar v. Dinobandhoo Biswas ...	533
Sale under Public Demands Recovery Act, what passes; <i>see</i> Certificate sale ...	628
Sale without deciding whether occupancy holding was saleable or not, if valid—Insolvency proceeding, <i>see</i> Provincial Insolvency Act, Secs. 16, 20, 46(3) ...	564
Sale Certificate — <i>Construction—Boundary—Area.</i> In the sale certificate the boundaries of parcels sold were set out in detail. In the case of each parcel the area also was stated. <i>Held</i> , that the purchaser took the plots as defined by the boundaries, and if within those boundaries there was more or less of land than that stated in the sale certificate, he obtained a title to whatever was contained within those boundaries. Gossaindas Kundu v. Krittunjoy Agnan Sardar ...	541
Saltpetre , exclusive right to dig— Nimah Sayer Mahal, Permanent Settlement of—Reasonable right of user—Permanent Settlement—Assets—Grant—Review—Appeal, restoration and re-hearing of.	

Saltpetre—(Contd.)

The first matter to be determined in considering the effect of a Permanent Settlement is, what were the assets of the estate then settled. The doctrine of English real property law, with its maxim *ejus est solus ejus est usque ad coelum et ad inferos* is applicable to the settlement of estates in Behar.

A grant carries with it the means reasonably necessary for its enjoyment.

A separate right exists in respect of saltpetre.

Where both the zemindari and the *Nimak Sayar Mehal* within the zemindari were separately settled under the Permanent Settlement, the proprietor of the *Nimak Sayar Mehal* is entitled to enter on the land comprised in the estate of the zemindar and exercise therein in a reasonable manner the rights vested under the grant (e.g. the exclusive right to dig saltpetre). The mode of reasonable user in such cases, explained.

An appeal was heard and disposed of by two Judges of the High Court. After the retirement of one of the Judges, the other Judge entertained an application for review of judgment and granted it; he subsequently proceeded to hear the appeal and delivered a judgment in agreement with and confirmation of the judgment by which the appeal had been originally disposed of. The plaintiff appealed under clause 15 of the Letters Patent:

Held, that as soon as the review had been admitted, the appeal was restored, and could thereafter be heard only by the Division Bench in charge of the Group to which the appeal belonged. **Golab Chand v. Janki Koer** ... 151

Second appeal—Civil Procedure Code (1908), Sec. 102—Account, suit for.

A second appeal from a decree passed in a suit for account is not barred by section 102 of the Code of Civil Procedure. **Himat Khan v. Sher Khan** ... 260

Separate entries in the revenue records—Presumption of jointness—

Inference from acts of the members; *see* Hindu Law—Presumption ... 234

Service tenure—Land, when can be alienated; *see* Jagir ... 277

Servient owner, if can compel dominant owner to continue easement right, *see* Easement ... 131

Settlement for term—Less rent payable during term—Rent payable after expiry of term; *see* Rent, enhancement of ... 502

Settlement Rent Roll, entry in, correction of—Bengal Tenancy Act, Secs. 104B, 104E, 104H.—Secretary of State for India in Council, suit against—Notice—Civil Procedure Code (Act V of 1908), Sec. 80—Objection to the entry under section 104E, whether sufficient notice.

In order to institute a suit against the Secretary of State for India in Council under section 104H of the Bengal Tenancy Act for correction of an entry in the Settlement Rent Roll, a formal and distinct notice setting out the necessary particulars, as required by section 80 of the Code of Civil Procedure should be given, and in default of such notice being given the plaintiff's suit is incompetent and not maintainable.

An objection made to an entry in the Settlement Rent Roll under section 104E of the Bengal Tenancy Act is not a sufficient notice within the meaning of section 80 of the Code. **Hari Mohan Misra v. The Secretary of State for India in Council** ... 360

Settlement Rent Roll, entry in, objection as to, if sufficient notice—Civil Procedure Code (1908), Sec. 80; *see* Settlement Rent Roll, entry in, correction of ... 366

Share in arrear—Defaulter, if to show erroneous debit, *see* Revenue sale ... 505

Share in arrear—Estate not in arrear—Revenue. Sale. Law, Sec. 13; <i>see</i> Revenue sale ...	505
Shobait , if to apply the proceeds—Image, consecration of—Endowment of land—Image, mutilation or destruction of—Consecration of another image in the same village; <i>see</i> Ejectment, suit for ...	347
Shobait , refusal of, to apply proceeds, effect of—Image, consecration of, after destruction of old—Debutter; <i>see</i> Ejectment, suit for ...	347
Son , if bound—Joint Hindu Family—Father's power to compromise—Father as guardian <i>ad litem</i> of his minor son—Partition, suit for—Civil Procedure Code (1832), Sec. 462, <i>see</i> Hindu Law—Suit for partition ...	1
Specific performance , suit for—Agreement to lease share of a member of joint family governed by Mitakshara law—Lease as to entirety, if can be enforced for part.	
A member of a joint family governed by the Mitakshara law cannot say that he has any particular share in the joint family property and cannot make a valid alienation of any particular share as his own.	
Hence a lease by a member of a joint family governed by the Mitakshara law of his share, is invalid in law and an agreement to lease such a share cannot be specifically enforced.	
Where a person is jointly interested in an estate with another person and purports to deal with the entirety, specific performance will not be granted against him as to his share the plaintiff's only remedy being by way of damages. Sheikh Abdul Rahman v. Jadunandan Singh Jha ...	
Specific performance , suit for, maintainability of—Suit for declaration of title and possession—Fictitious suit, decree and sale—Agreement to execute release; <i>see</i> Fraud ...	616
Specific performance as to part, if can be granted—Person jointly interested with another, dealing with entirety—Remedy; <i>see</i> Specific performance, suit for ...	344
Specific Relief Act , Sec. 41—Declaratory suit—Declaration that previous decree not binding on minors; <i>see</i> Decree, setting aside of ...	384
Statement , inherent quality of, not confession, if can be used against co-accused; <i>see</i> Evidence, admissibility of ...	590
Statement , when can be used against co-accused under section 10 of Evidence Act, <i>see</i> Evidence, admissibility of ...	590
Statement made in the absence of an accused, when admissible, <i>see</i> Criminal proceedings ...	365
Statement on information and belief, when admissible—Civil proceeding; <i>see</i> Contempt of subordinate criminal Court ...	454
Statements , which are inventions, evidentiary value of, <i>see</i> Criminal proceedings ...	365
Stranger —Share given on partition to adopted son—Suit to set aside adoption, <i>see</i> Hindu Law—Partition ...	237
Sub-division —Rent receipts showing shares of tenants and rent; <i>see</i> Putni tenure ...	174
Sub-lease , effect of, against superior landlord—Sub-lease, registered in contravention of section 85, sub-sec. (2) of the Bengal Tenancy Act; <i>see</i> Ejectment ...	252
Sub-lease by raiyat, if an encumbrance; <i>see</i> Ejectment ...	252
Sub-letting by raiyat not valid—Holding not subsisting after abandonment under raiyat, position of, <i>see</i> non-transferable occupancy holding ...	193

Subsequent conduct of parties, reference to Grant, nature of, determination of—Terms ambiguous, <i>see</i> <i>Hikmah</i> , tenure	...	23
Substitution , application for, if proper—Plaintiff, death of—Dismissal for default—Civil Procedure Code, O. IX, R. 3. applicability of; <i>see</i> Sult, maintainability of	...	9
Succession —Taluqdari tenure and acquisitions, <i>see</i> Oudh Law	...	200
Sudder Mizamat Adalat, power of; <i>see</i> Contempt of subordinate criminal Court	...	452
Suit , dismissal of—Drawing of decree, effect of; <i>see</i> Appeal, if lies	...	128
Suit , maintainability of— <i>Suit, dismissal of, for default—Plaintiff, death of—Code of Civil Procedure (Act V of 1908), Sec. 151 and Order 22, Rule 3—Mistake—Court's inherent power—Legal representative—Application for substitution—Limitation Act (IX of 1908), Sch. 1, Art 176.</i>		

Where the fact that the plaintiff was dead was unknown to the Judge, who dismissed the suit for non-appearance of the plaintiff and the deceased plaintiff's son applied within the period of six month's limitation under the Indian Limitation Act, Sch. 1, Art. 176 to have his name substituted in place of his deceased father under the Code of Civil Procedure, Order 22, Rule 3:

Held, that the Rules or Orders of the Code dealing with the case of non-appearance of a sutor were inapplicable to the situation which arose when the sutor was dead, that upon being pointed out the mistake it was the duty of the Court to rectify it, and that the application for substitution should be granted and the suit proceeded with.

Held also, that quite apart from section 151 of the Code of Civil Procedure 1908 the Court possessed an *inherent power* to rectify the mistake which had been inadvertently committed, but that section could be properly invoked and, apart from points of procedure and otherwise, should be taken advantage of.

The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead or the ranking of death under the category of default, is not stateable. **Raja Debi Bakhsh Singh**

v. Habib Shah ... 9

Suit , against Secretary of State for India in Council—Bengal Tenancy Act, Sec. 104 H—Civil Procedure Code (1908), Sec. 80—Notice, effect of not giving; <i>see</i> Settlement Rent Roll, entry in, correction of	...	566
Suit for additional rent for excess land—Plaintiff to prove what; <i>see</i> Hindu widow	...	633
Suit for declaration of nullity of decree—Suit brought several years after attainment of majority—Plaintiff, though minor, sued in the previous suit as major; <i>see</i> Decree, if void	...	18
Suit for declaration that previous decree not binding on minors, maintainability of—Specific Relief Act, Sec. 42; <i>see</i> Decree, setting aside of	...	384
Suit for recovery of possession, bar of—Title, extinguishment of—Title, declaration of; <i>see</i> Declaratory suit, maintainability of	...	601
Suit to set aside father's alienation of ancestral property—Relief, nature of, to be granted—Equity between father and his alienor; <i>see</i> Hindu law—Partition	...	237
Supreme Court , power of—Contempt of Court not subordinate, <i>see</i> Contempt of subordinate criminal Court	...	452

Surrender—Bengal Tenancy Act, Sec. 86 Sub-Sec. (5)—Condition not fulfilled; *see* Ejectment ... 257

Taluk—*Permanent tenure*—*Purchaser of portion*—*Rent suit*—*Purchaser not made party, if affected.*

If there be nothing, either in the surrounding circumstances or in the instrument itself which creates the interest, to show that it was intended to be otherwise, the inference is, that the tenancy called a *taluk* constitutes a permanent tenure.

A landlord is not at liberty to ignore a purchaser of a portion of a tenure and prejudice his position by a decree made in a suit to which he had not been joined as a party. **Budayar Rahman v. Karam Ali** ... 271

Taluk, what connotes—*Permanent tenure*; *see* Taluk ... 271

Temporary injunction, order refusing—*Civil Procedure Code*, O. XXXIX, R. I; *see* Appeal... 39

Tenant, liability of—*Contract*—*Garden and bastu lands*—*Garden converted into bastu land*; *see* Enhanced rent, claim for ... 324

Tenure—*Purchaser of portion not made party*—*Decree, if binding* *see* Taluk ... 271

Tenure, defaulting, purchase by landlord, in execution of his money decree subject to rent charge, effect of, *see* Rent decree, execution of ... 29

Tenure created by document—*Alienability*—*Forfeiture*, *see* Jagir ... 277

Tenures, protected and unprotected, mixed together—*Purchaser at revenue sale*; *see* Ejectment, suit for ... 332

Third Judge, decision of, on reference—*Letters Patent* (1863) cl. 41; *see* Leave to appeal to Privy Council ... 121

Third Judge, duty of—*Civil Procedure Code* (Act V of 1908), Sec. 98.

When there is a reference under section 98 of the Code of Civil Procedure, 1908, the third Judge should confine himself to a consideration of a point of law only. **Kunwar Partab Singh v. Bhabuti Singh** ... 384

Time, for application, extension of—*Fraud of execution-creditor*—*Bengal Tenancy Act*, Sec. 174, *see* Sale, setting aside of ... 533

Time, for filing objection, to award, if can be extended—*Limitation Act* (1877), Sec. 5, Sch. II, Art. 158; *see* Appeal ... 35

Title, extinguishment of—*Suit, recovery of possession*, bar of—*Title, declaration of*; *see* Declaratory suit, maintainability of ... 601

Transfer by unauthorized person who subsequently acquired interest in property transferred—*Subsequent transfer*—*Subsequent transferee not a bona fide purchaser for value without notice*—*Transfer of Property Act*, Sec. 43—*Prior mortgages*, suit by—*Decree against transferor of subsequent transferee*—*Suit dismissed against subsequent transferee*—*Evidence Act*, Sec. 115, *see* Ejectment, suit for ... 181

Transfer of case—*Criminal Procedure Code* (Act V of 1898), Sec. 526—*Security for keeping peace*—*Magistrate acting as private arbitrator*—*Magistrate, if can subsequently try.*

Where a Magistrate has dealt with a dispute between two parties in an informal manner as a private arbitrator:

Held, he should not afterwards deal with the same dispute between the same parties as a Magistrate, as it would be inconvenient and embarrassing for him to do under the strict restrictions of the Procedure Code and the Evidence Act and as his previous informal knowledge must necessarily hamper him at every turn. **Gobinda Chandra Ray v. Gopal Chandra Pandit** ... 150

Transfer of property Act , Sec. 43—Transfer by unauthorised person, who subsequently acquired interest in property transferred—Subsequent transfer—Subsequent transferee not a <i>bona fide</i> purchaser for value without notice—Prior mortgagee, suit by—Decree against transferor of subsequent transferee—Suit dismissed against subsequent transferee—Evidence Act, Sec. 115; <i>see</i> Ejectment, suit for ...	181
Transfer of property Act , Sec. 89, decree under—Decree declaring personal liability of mortgagor, <i>see</i> Court-fee, amount deposited for, refund of ...	133
Transfer of property Act , Sec. 90, decree under, when can be passed; <i>see</i> Court-fee, amount deposited for, refund of ...	133
Trespasser —Ideal possession—Rightful owner; <i>see</i> Dispossession ...	274
Trespasser , possession of, when available against rightful owner; <i>see</i> dispossession ...	274
Trustee—Revenue sale —Disputing co-owner purchaser—Purchaser, if trustee for other co-owner ...	111
Where a revenue sale is caused by the default of a co-owner and the property is afterwards purchased at that revenue sale by that co-owner, there may be such relation, between the defaulter and his co-owner as would make it right for the Court to treat such a sale as made for the benefit of both.	
Fakur Rahman v. Mimansa Khatun ...	111
Under-raiyat , if raised to raiyat—Purchase of superior tenure by occupancy raiyat— <i>Bengal Tenancy Act</i> (VIII of 1885), Sec. 22(b), before amendment.	
The effect of a purchase by an occupancy raiyat of a superior permanent tenure, under section 22(b) of the Bengal Tenancy Act as framed in 1885, is to vest the holding in the purchaser, subject to the limitation that the occupancy right ceases to exist and an under-raiyat is not raised to the status of a raiyat but continues to be an under-raiyat.	
Akhil Chandra Biswas v. Husain Ali Sowdagar ...	262
Under-raiyat's position —Invalid sub-lease by raiyat—Holding not subsisting after abandonment; <i>see</i> Non-transferable occupancy holding ...	193
Under-raiyati interest , if transferable.	
An interest of an under raiyat is not <i>ipso facto</i> transferable. An under-raiyat may under certain circumstances acquire a right of occupancy, and if he so acquires it, his right is transferable.	
Akhil Chandra Biswas v. Husain Ali Sowdagar ...	262
Waters , if part of river—Fishery right—Court's duty; <i>see</i> Fishery right ...	399
Will , requisites of; <i>see</i> Hindu Law—Partition ...	57
Witness , capacity of, to testify—Judge to decide, <i>see</i> Evidence, admissibility of ...	582
Witness , examination of, by Court—Procedure to be followed by Court—Evidence Act, Sec. 165; <i>see</i> Rateable distribution ...	646
Wrongful Act in exercising right of fishery—Time, running of—Limitation Act (1908), Sec. 23, <i>see</i> Fishery right ...	399
Zemindari , nature of—Sanad in common form—Madras Regulation XXV of 1802, <i>see</i> Hindu Law—Succession ...	393

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INDEX TO SHORT NOTES.

ARTICLES.

Annals of the Bengal Bar, The	...	...	...	...	55n
Extinguishment of Easements	...	...	...	...	13n
Lawyer and Physician. A Contrast	...	...	...	...	45n
Limitation in case of execution of decree by co-sharer landlord	...	...	...	...	1n
Origin of Occupancy Right in Bengal	...	...	...	...	27n

REVIEW.

Reviews	...	...	...	...	9n, 10n, 24n, 25n, 26n, 61n, 62n, 63n, 64n.
---------	-----	-----	-----	-----	---

NOTES ON CASES.

Anand Mahanti v. Ganesh Maheswar (1913) I. L. R. 40 Calc.	678	...	67n
Asgar Ali v. Emperor (1913) I. L. R. 40 Calc.	846	...	66n
Aziz Sheikh v. Emperor (1913) I. L. R. 40 Calc.	631	...	37n
Bangali Shaha v. Emperor (1913) I. L. R. 40 Calc.	702	...	66n
Bhola Nath Roy v. Secretary of State (1912) I. L. R. 40 Calc.	503	...	21n
Bhupendra Nath Bose v. Bansl Tanti (1913) I. L. R. 40 Calc.	870	...	65n
Bidyaprasad Narain Singh v. Ashrafi Singh (1913) I. L. R. 40 Calc.	862	...	68n
Durga Prasad v. Lachman Banla (1913) I. L. R. 40 Calc.	584	...	41n
Ganesh Lal v. Charan Singh (1913) I. L. R. 35 All.	247	...	20n
Harihar Prasad v. Shyam Lal (1913) I. L. R. 40 Calc.	615	...	40n
Indra Chandra v. Sris Chandra (1913) I. L. R. 40 Calc.	537	...	22n
In re Rangan (1904) I. L. R. 36 Mad	96	...	3n
In re Venkata Reddy (1911) I. L. R. 36 Mad.	216	...	38n
In re Venkata Row (1911) I. L. R. 36 Mad.	159	...	11n
Jamna Doss v. Sabapatty Chetty (1911) I. L. R. 36 Mad.	188	...	11n
Karl Singh v. Emperor (1912) I. L. R. 40 Calc.	433	...	39n
Kastur v. Cheranji (1913) I. L. R. 35 All.	265	...	12n

Kilmer v. British Columbia Orchard Lands Limited (1913) A. C. 319	...	8n
Mira Mohidin Rowther v. Nallaperumal Pillai (1911) I. L. R. 36 Mad. 131	...	6n
Naldab Howladar v. Emperor (1913) I. L. R. 40 Calc. 891	...	65n
Nanja Pillai v. Sivabagyathachi (1911) I. L. R. 36 Mad. 116	...	7n
Parsotam Das v. Patesri Partab Narain Singh (1913) I. L. R. 35 All. 250	...	20n
Prosad Chunder De v. Corporation of Calcutta (1913) I. L. R. 40 Calc. 836	...	68n
Ram Angatha v. Emperor (1913) I. L. R. 40 Calc. 511	...	21n
Ramasami Chetti v. Poona Padayachi (1910) I. L. R. 36 Mad. 97	...	4n
Ramprasanna v. Secretary of State (1913) I. L. R. 40 Calc. 895	...	65n
Rickards v. Lothian (1913) A. C. 263	...	23n
Sree Krishna Dass v. Alumbi Ammal (1911) I. L. R. 36 Mad. 108	...	5n
Srish Chandra v. Triguna Prasad (1913) I. L. R. 40 Calc. 541	...	21n
Suleed Ali v. Emperor (1913) I. L. R. 40 Calc. 849	...	67n
Subramania Pillai v. Seethal Ammal (1911) I. L. R. 36 Mad. 135	...	7n
Vacher and Sons Ltd. v. London Society of compositors (1913) A. C. 107	...	41n
Vydlanatha Aiyar v. Subramania Patter (1911) I. L. R. 36 Mad. 104	...	5n

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No. 1.

LIMITATION IN CASE OF EXECUTION OF DECREE BY CO-SHARER LANDLORD.

The period of limitation for execution of decrees for rent has been laid down in Art. 6, Schedule III of the Bengal Tenancy Act. This article speaks of application for the execution of a decree or order made in a suit between landlord and tenant to whom the provisions of the Bengal Tenancy Act are applicable. The period of limitation is three years from the date of decree or order; or where there has been an appeal, from the date of the final decree or order of the appellate Court; or where there has been a review of judgment, from the date of the decision passed on the review.

The question now is, whether the decree for rent passed in favour of a co-sharer landlord is a decree made in a suit between landlord and tenant to whom the provisions of the Bengal Tenancy Act are applicable. Before the amendment introduced by Act 1 (B. C.) of 1907, the article stood:—"Application for the execution of a decree or order made under the Bengal Tenancy Act, or any Act repealed by the Bengal Tenancy Act." On this it was held by Banerjee, J., in *Kedar Nath Banerjee v. Ardha Chunder Roy* (1), that such decrees are not rent decrees and the provisions of the Bengal Tenancy Act are not applicable in such cases. His Lordship based his decision upon the applicability or inapplicability of section 188 of the Bengal Tenancy Act as the criterion for determining whether the decree is a rent decree or not. It has been stated in section 188 that the whole body of landlords must be joined in the suit, but as a suit by a co-sharer landlord has not been brought by the whole body of landlords, it has been laid down in the case that it is not a suit under the Bengal Tenancy Act. That case lays down that a suit by a co-sharer landlord for his share of rent is instituted under the general law, and not under the Bengal Tenancy Act. But as laid down by their Lordships of the Privy Council in *Pramada Nath Roy v. Ramani Ranta Roy* (2), a suit for rent, whether it be by the entire body of landlords for the entire rent or by the co-sharer

(1) (1901) I. L. B. 29 Calo. 54; 5 O. W. N. 768.

(2) (1907) I. L. B. 85 Calo. 881 P. O.

landlord for his share of rent, is not a proceeding under the Bengal Tenancy Act. Both classes of suits are instituted under the "general law." There are cases like those contemplated in section 148A and section 158B of the Bengal Tenancy Act in which the whole rent is claimed making the other co-sharer landlords parties defendants, and this has the special sanction in the Bengal Tenancy Act. But a co-sharer landlord claiming his share of rent only is of course proceeding under general law, and this he can do, only in case he has got separate collection of rent for his share; thus to create a separate tenancy, as it were, with the tenant thus paying him rent. A doubt would have arisen that in such cases the provisions of general law are applicable, unless such doubt had been dispelled by their Lordships of the Privy Council in the case stated above.

Now after the amendment the article speaks of a decree in a suit between landlord and tenant to whom the provisions of the Bengal Tenancy Act are applicable, so that it is not necessary to see whether the suit was instituted under the general law or under the Bengal Tenancy Act, to make this article applicable, but we have to see whether or not the provisions of the Bengal Tenancy Act are applicable to the landlords and tenants between whom such suit was brought. Thus the rule laid down in the case of *Kedar Nath v. Ardha Chander* (1), can no longer be considered as good law.

We have now to see in what case the provisions of the Bengal Tenancy Act may be said to be applicable to the landlord and tenant between whom the suit is brought. The special provisions of the Bengal Tenancy Act contain amongst others, the fact that damages can be claimed under section 68 and rent for four years can be claimed under Art. 2, Schedule III of that Act without being time barred. The claim for interest (now at 12½ per cent.) under section 67 of that Act is also a special feature. Moreover there are many special provisions laid down in Chapter XIII of that Act as to the procedure to be followed in such suits. Thus in such cases the defendant cannot file a written statement without the leave of the Court. In suits for *bastu* rent in which the provisions of the Transfer of Property Act are applicable to the landlord and tenant, no such provisions are laid down, and the tenant defendants can file written statement in Court as of right and no leave of the Court is necessary. The learned Judges

(1) (1901) I. L. B. 29 Calc. 54.

in the case of *K. B. Dutt v. Gostha Behary Bhuiya* (1), state in the judgment "so far as we can ascertain from the materials before us, there is nothing to indicate that, in that decree, the petitioners invoked the application of the provisions of any section of the Tenancy Act." From the facts of the case as appears from the report, it seems that the decree-holder petitioner brought a suit for rent which was duly decreed. There the suit must have been registered as a rent suit, and the defendant must have to take leave of the Court to file his written statement, if he did appear at all. Thus the provisions of the Bengal Tenancy Act are applicable to them, and the case comes under Art. 6, Schedule III of that Act. The case of *Thakamani Dasi v. Mohendra Nath Dey* (2) cannot be distinguished from that case as has been done by the learned Judges who decided that case, but is on all fours with it. The true criterion to determine whether a decree has been made under the Bengal Tenancy Act, is, as laid down by Sir Asutosh Mookerjee in *Thakomoni Dassi's* case, whether it terminates a suit tried in accordance with the Act and not whether it is capable of execution under Chapter XIV of the Act. With due deference to the learned Judges who decided the case of *K. B. Dutt v. Gostha Behary* (1) it appears that the case cannot be distinguished from the case of *Thakamoni* (2), and the cogent rule laid down in that case is applicable to this case also. [The case of *K. B. Dutt v. Gostha Behary* was however doubted and not followed in a recent *unreported* case of *Mrityunjoy v. Bholanath* (Mis. 93 of 1913) decided by Mookerjee and Beachcroft JJ. on the 14th April, 1913].

SURENDRA NATH RAY,—*Katwa*.

(1) (1912) 16 O. W. N. 1006. (2) (1909) 10 O. L. J. 468.

NOTES ON CASES.

Criminal Procedure Code, section 110—Scope of its operation.

Section 110 of the Criminal Procedure Code is not to be restricted in its operation only to such persons as "*reside*" within the local limits of the jurisdiction of the Magistrate taking action thereunder. The words "any person *within the local limits* of his (Magistrate's) jurisdiction" in the section mean any person who is within such limits at the time when the Magistrate takes action. The narrower interpretation, supported as it is by the authority of the Calcutta High Court in the case of *Ketaboi v. Queen-Empress* (1), is rejected as calculated to defeat the object of the section—the prevention of crime.

(1) (1900) 1 L. R. 27 Calo. 398.

1904.

I. L. R. 36 Mad. 96.

In re Rangan.

Benson & Boddam JJ.

1910.

I. L. B. 88 Mad. 87.

Ramasami Ohetti

v.

Ponna Padayachi.

Rahim & Ayling, JJ.

Adverse possession against Mortgagor—Effect against Mortgagee.

The view taken in this case that adverse possession by a stranger for 12 years of a property subject to a mortgage, not only extinguishes the mortgagor's rights, but also bars the remedy of the mortgagee,—even if the latter's right to enforce the mortgage against the mortgagor be kept alive, say, by payment of interest or acknowledgment,—has been dissented from in a later case of the Madras High Court, *Parthasarathy Naicken v. Lakshmana Naicker* (1), a summary of which appears in 17 C. L. J. 12n—13n. The last case followed the law laid down by Maclean C. J. in *Aimadar Mandal v. Makhan Lal Day* (2), but their Lordships (Abdur Rahim and Ayling JJ.) in the present case decline to accept that decision as supported by the authority of *Heath v. Pugh* (3) and *Pugh v. Heath* (4), on which Maclean C. J. purported to base his view. Say the learned Judges:—"A person who is in adverse possession of land for 12 years acquires a title to the land, the rights of the owner of the land being extinguished; and since a mortgage is merely a security for the debt and the interest in the land remained in the mortgagor, it is difficult to see how the existence of the mortgage at the time adverse possession commenced, can prevent the person in such possession acquiring the ownership of the land." "There may be cases," their Lordships add, "in which a person claiming to have acquired a title by prescription would acquire it subject to the existing mortgage, but that would depend upon whether the person in possession intended to acquire an absolute title or only a title subject to the rights of the mortgagee."

The point is not free from difficulty, and as is well-known, has given rise to some divergence of judicial opinion. Reference is made in the present case to the following decisions:—*Ammu v. Ramakrishna Sastri* (5), *Prannath Roy Chowdry v. Rookea Begum* (6), *Ram Coomar Sein v. Prosunno Coomar Sein* (7), *Sheoamber Sakoo v. Bhowansadeen Kulwar* (8), and *Karan Singh v. Bakar Ali Khan* (9).

(1) (1911) I. L. B. 85 Mad. 281.

(2) (1906) I. L. B. 33 Cal. 1015.

(3) (1881) 6 Q. B. D. 845.

(4) (1882) 7 A. C. 285.

(5) (1879) I. L. B. 2 Mad. 226 (229.)

(6) (1859) 7 Moo. L. A. 823 (855.)

(7) (1864) 1 W. B. 375.

(8) (1870) 2 N. W. P. H. O. B. 223.

(9) (1888) I. L. B. 5 All 1 (P. O.)

Execution of decree partly for ascertained, partly for unascertained amount—Limitation to run from what date.

Where a decree of the High Court in a second appeal awarding costs both in the High Court and in the lower appellate Court, stated the amount of the costs in the High Court, but left the costs in the lower appellate Court to be taxed and determined by that Court, it was held (*Benson and Sundara Ayyar JJ.*) that an application for the execution of the *whole* decree, presented more than three years after the date of the decree, but within three years from the date of the ascertainment of the costs in the lower appellate Court by that Court, would be within time. The contention was that the decree was barred, at any rate so far as it related to the costs in the High Court, which were known and ascertained at the date of the decree. But their Lordships held that for purposes of execution the policy of the Limitation Act was to treat the decree as a whole, and apply a single starting-point to the same. The case might have been different, if the decree itself directed different portions of the relief to be rendered at different times. Reference was made to *Ratnachalan Ayyar v. Venkatrama Ayyar* (1) and *Krishnan v. Nilkantan* (2), in support of the principle that where a decree is for a sum of money to be ascertained in future, limitation runs from the date of such ascertainment,—a principle which was held to apply equally to a case where only a portion of the decretal amount was left to be ascertained, as here. Art. 182 of the Limitation Act was also relied on as throwing light on the intention of the Legislature in the matter of execution of decrees. The decision was, further, stated to be in accord with that of the Privy Council in *Haji Ashfaq Husain v. Lala Gauri Sakai* (3).

Transfer of decree for execution—Rule of Limitation applicable.

The proposition is well-established that the law of limitation applicable to the execution of a decree depends upon the Court which passed the decree, and not upon the Court executing the same. *Tincowrie v. Debendro* (4), *Jogemaya v. Thackomoni* (5) and *Sambasiva v. Panchanada* (6). So where a decree passed by the Madras Small Cause Court was transmitted for execution to the City Civil Court, and section 48 of the Code of Civil Procedure applied to the latter, but not to the former Court, it

1911.

I. L. B. 88 Mad. 104.
Vydlanatha Aiyar
v.
Subramania Patter.
Benson & Sundara
Ayyar, JJ.

1911.

I. L. B. 36 Mad. 108.
Sree Krishna Doss
v.
Alumbi Ammal.
Sundara Ayyar
and Ayling, JJ.

(1) (1906) I. L. B. 29 Mad. 46.

(2) (1907) I. L. B. 80 Mad. 268.

(3) (1911) I. L. B. 88 L. A. 37; I. L. B. 88 All. 264; 18 O. L. J. 851; 15 O. W. N. 870.

(4) (1890) I. L. B. 17 Cal. 491.

(5) (1897) I. L. B. 24 Cal. 478.

(6) (2008) 17 M. L. J. 441; I. L. B. 81 Mad. 24.

was held that an application for execution presented in the City Civil Court more than 12 years from the date of the decree would not be barred under section 48, inasmuch as that section would not govern the case. It is obvious that any other rule would lead to anomalous consequences.

1911.

I. L. R. 86 Mad. 181.

Mira Mohidin
Bowtherv.
Nallaperamal Pillai.

Ayling & Sponner JJ.

Limitation Act, section 4—Period of closing of wrong Court—Not to be deducted.

Where a suit was filed in a wrong Court on the first day the Court re-opened after recess, the period of limitation for the suit having expired during the recess, and the proper Court in which the plaint ought to have been filed and to which the plaint was subsequently returned to be filed, was not closed during that period, it was held, on a question of limitation being raised in the second Court, that under section 4 of the Limitation Act the plaintiff was not entitled to a deduction of the period during which the wrong Court remained closed. The word "Court" in that section, though not qualified by any adjective, must still be taken to mean only the "proper Court" having jurisdiction to entertain the suit, and not any other. As the suit here would have been clearly out of time, if filed in the right Court on the day on which it had been actually instituted in the wrong one, the result was that the suit was dismissed as barred by limitation.

Under section 14 of the Limitation Act, the plaintiff was, of course, held entitled to a deduction of the period from the filing of the plaint in the first Court to its re-presentation in the second one; and it was, further, held on the authority of numerous cases, amongst others the following, that the plaintiff could claim the cumulative benefit of the extensions granted by more than one section of the Act at the same time, provided the same were applicable. *Fawahir v. Narain* (1), *Siyadat-un-nissa v. Muhammad* (2), *Tukaram v. Pandurang* (3), *Saminatha v. Venkatasubba* (4), *Silambar v. Ramanadhan* (5) and *Banee v. Haran* (6). But all this was of no avail to the plaintiff, for, as stated above, section 4 was held not to apply at all.

(1) (1878) I. L. R. 1 All. 644.

(4) (1897) I. L. R. 19 All. 842.

(2) (1901) I. L. R. 26 Bom. 584.

(5) (1904) I. L. R. 27 Mad. 21.

(3) (1910) I. L. R. 38 Mad. 256.

(6) (1875) 24 W. R. 405.

Limitation Act—Revision to High Court not an "appeal"
within Article 182.

The question was whether, in a case where an application is made to the High Court in its revisional jurisdiction to set aside an order or decree of an inferior Court, under section 115 of the Code of Civil Procedure, 1908, or section 25 of the Provincial Small Cause Courts Act, and the application is dismissed, a fresh starting-point is created from the date of the High Court's order for the computation of limitation for the execution of the order or decree of the lower Court. The question was answered in the negative. A revision petition was held not to come within the word "appeal" in clause (2) of Art. 182 of the Limitation Act (1908). It is held, no doubt, in the cases of *Secretary of State v. British India Steam Navigation Co.* (1) and *Harish Chandra Acharjee v. Nawab Bahadur of Moorsheedabad* (2), that an order passed by the High Court in the exercise of its revisional jurisdiction under section 115 of the Code of Civil Procedure (or of its power of superintendence under section 15 of the Charter Act) is an order passed on "appeal." But there the question is decided solely with reference to section 39 of the Letters Patent for the purposes of an appeal to the Privy Council, whereas the Limitation Act obviously contemplates a more restricted interpretation of the word "appeal," witness the division it makes in the first Schedule between "suits," "appeals," and "applications."

Where a revision application is granted (and not dismissed) by the High Court, the starting point of limitation is necessarily postponed. For, then the High Court either passes a new decree or order in supersession of that of the lower Court, or directs the lower Court to amend its order or decree; either of which cases is covered by the express language of Article 182 [clause (1) or (4).]

• *Mitakshara Law—Succession to stridhan—Co-wife's daughter a preferential heir to husband's sapindas.*

This case affirms the right of the daughter of a co-wife of a deceased woman, married in one of the approved forms, to succeed to the *stridhan* property of the latter, in preference to a *sapinda* of her husband, under the Mitakshara law. It is now well-settled that the succession to the *stridhan* estate of a childless woman married in an approved form follows, in default

(1) (1911) 18 O. L. J. 668; 15 O. W. N. 879.

(2) (1911) 18 O. L. J. 90; 15 O. W. N. 848.

1911.

I. L. R. 38 Mad. 135.

Subramania Pillai

Seethal Ammal.

Ayling & Spencer JJ.

1911.

I. L. R. 36 Mad. 116.

Nanja Pillai

Sivabagyathachari

Abdur Rahim
 and Ayling JJ.

of the husband, the same order as that laid down by the Mitakshara in regard to the succession to the property of a male dying without male descendants. The first in order, therefore, comes the wife, *i. e.*, the rival wife of the deceased woman, then the daughter, *i. e.*, the step-daughter of the deceased, and so on. The matter is discussed with reference to the original texts in a recent judgment of the Calcutta High Court by N. R. Chatterjee J., *Dwarkanath Ray v. Sarat Chandra Singh Ray* (1), where the learned Judge points out Colebrooke's mistranslation of the word "*sapinda*" (in placitum II, section XI, Chapter IX of the *Mitakshara*) as "kinsmen allied by funeral oblations" instead of as "kinsmen allied by community of corporal particles or by affinity."

Relief against forfeiture—Agreement for sale—Non-payment of purchase-money.

J. C.
[1913] A. C. 819.
Kilmer
c.
British Columbia
Orchard Lands,
Limited.
Lord Macnaghten,
Lord Atkinson,
Lord Moulton.

By an agreement for sale, providing for the payment of the purchase-money in specified instalments on specified dates, it was stipulated that in the event of a default in the payment of any one instalment, the agreement was to be null and void and all past payments under it absolutely forfeited to the vendor,—time being declared to be of the essence of the contract. In an action by the vendor to enforce the forfeiture on a default by the purchaser, the Judicial Committee held that the stipulation was in the nature of a penalty from which the defendant was entitled to be relieved, and in the result dismissed the vendor's claim, and decreed the purchaser's counter-claim for specific performance on payment of the purchase-money then due. The case was held to come within the ruling in *In re Dagenham (Thames) Dock Co., ex parte Hulse* (2), where the law was thus stated by Mellish L. J. :—"Where there is a stipulation that if on a certain day an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty." The Court will not enforce what is a mere penalty for the non-payment of the purchase-money. In the present case, it is clear that the penalty, if enforced according to the letter of the agreement, would become more and more severe as the agreement approached completion, and the money liable to confiscation would become larger.

(1) (1911) I. L. R. 39 Calo 319; 15 O. W. N. 1036.

(2) (1873) L. R. 8 Ch. D. 1022.

The Calcutta Law Journal.

VOL. XVIII. }

CALCUTTA, JULY 18, 1913.

} No. 2.

REVIEWS.

Digest of Indian Case Law FOR 1912 by S. SRINIVASA AIYER, B.A., B.L. MADRAS 1913.—All members of the profession must extend a cordial welcome to the new volume of the annual Digest by Mr. Aiyer which is characterised by all the excellent qualities of its predecessors, namely, conciseness, accuracy and lucidity of arrangement and expression.

The Indian Decisions, Old Series, Vol. VIII. BENGAL SADAR DEWANY ADALAT. LAW PRINTING HOUSE, MADRAS 1913.—This magnificent series continues to make steady and fairly rapid progress. The present volume reproduces the seventh or concluding volume of the Report by Macnaghten which covers the period 1841-48, as also the first volume of the Sadar Dewany Adalat Report for the year 1845. The cases are not merely of historical interest ; those on Hindu Law are still of value as living authorities. We look forward to the completion of this important series the value whereof can hardly be over-estimated.

The Indian Decisions, New Series, Allahabad, Volume V. LAW PRINTING HOUSE, MADRAS, 1913.—The fifth volume of this series now before us notifies the important fact that the Government has at last consented to the reproduction of the matter contained in the Indian Law Reports. This will make it possible for the publishers to place the cases before the public in the same order as in the original Report. We congratulate the Government upon its decision and we have no doubt that the publishers, with the immense resources at their disposal, will make the best use of the permission they have secured and bring the Indian Law Reports within the reach of the average practitioner. The get up is extremely handsome and the volume has really a much better appearance than the original Government edition.

Sanjiva Rao's Digest of Privy Council Rulings by C. S. SOMANATHA SASTRI, THIRD EDITION. VOLUME I. LAW PRINTING HOUSE, MADRAS, 1913.—We desire to extend a hearty welcome to the new edition of Mr. Sanjiva Rao's well-known Digest of Privy Council Decisions. The first edition was published in 1890 and soon brought the author into prominence as a careful and reliable composer of a legal text book. The second edition was published in 1902 and was practically a new work. The third edition will occupy two volumes, each extending over nearly 1300 pages. Every Privy Council Decision on an appeal from India has been analysed and carefully noted down to the year 1912. The value of the work is enhanced by two circumstances, namely first that not merely the principal points but also the important *dicta* contained in the cases have been noted and *secondly*, that references are given to all important decisions in which the principle deducible has been applied or explained. We have no doubt that the new edition will find an even larger measure of support from the profession than its predecessors did.

All India Century Digest. CIVIL, 1811-1912. VOL. VII by B. R. DESAI, BARODA, 1913.—The seventh volume of the comprehensive Digest by Mr. Desai is now before us. It covers a number of important heads. Amongst which may be mentioned in particular Limitation, Mahomedan Law and Master and Servant. We have tested the Digest in many places and have satisfied ourselves that the same standard of excellence which we noted in the case of previous volume has been well-maintained. The volume occupies more than 1200 closely printed pages and is singularly free from errors.

Maines Ancient Law by PRATAPCHANDRA SEN GUPTA M.A., B.L., M. C. SARKAR & SONS, 75, HARRISON ROAD, CALCUTTA, 1913.—This book professes to be an analysis of the classical work of Sir Henry Maine on Ancient Law. The book has been prescribed by the University to be read by students and consequently must be subjected to the operation of a commentary and an analysis. Mr. Sen Gupta has done his work well and cannot very well be blamed if it is abused by students. A book of this description is useful and unobjectionable if applied for a legitimate purpose, namely, if it is used as a guide to the original work and not as a substitute therefor. In the hope that it will be properly used, we commend it to students.

NOTES ON CASES.

Order of Presidency Small Cause Court under section 195 of Criminal Procedure Code—Can High Court interfere on its Appellate Side?

Where an order is made by a Presidency Small Cause Court under section 195 of the Criminal Procedure Code, granting sanction for a prosecution, has the High Court on the Appellate Side jurisdiction to revoke it under clauses (6) and (7) of that section? Clause (7) in sub-clause (c) provides that "where no appeal lies, such Court (*i.e.*, the Court granting the sanction) shall be deemed to be subordinate to the *principal Court of original jurisdiction* within the local limits of whose jurisdiction such first mentioned Court is situate." Does this imply that for the purposes of this section the Presidency Small Cause Court is subordinate to the High Court only as "the principal Court of *original jurisdiction*," so that an application for revocation of the order for prosecution can be made only to that Court on the Original Side? In Calcutta, as is pointed out in *Sew Bollock Singh v. Ramdhan Bania* (1), the practice is to move the Original Side of the High Court in such cases. In the present case, however, the Madras High Court affirms the jurisdiction of the Criminal *appellate* Bench of that Court to deal with the matter. The object of clause (7) of section 195, it is said, is merely to designate the *Court* to which the application is to be made (or, as is somewhat loosely expressed, to which an "appeal" lies) under that clause, and not to specify the nature of the jurisdiction which such Court is to exercise in disposing of the matter. The effect, therefore, is only to make the High Court the proper tribunal in this case, and as the jurisdiction which the Court exercises in dealing with the order of the Small Cause Court is clearly appellate and not original, it follows that the Criminal Appellate Bench is competent to deal with the matter.

1911.
L. L. B. 86 Mad. 188.
Jamna Doss
v.
Sabapathy Chetty.
Sundara Ayyar &
Ayling, JJ.

Hand-writing expert—Value of his evidence.

The conviction in this case on a charge of forgery was based mainly on the uncorroborated testimony of a hand-writing expert, Mr. Charles Hardless, what little of corroborative evidence was on the record being of the weakest description. Their Lordships declined in these circumstances to uphold the conviction, and in doing so discussed generally the value to be

1911.
I. L. B. 86 Mad. 159.
In re Venkata Row.
Sundara Ayyar &
Spencer, JJ.

(1) (1910) L. L. B. 87 Cal. 714.

attached to such expert testimony. Some of the features, of the expert's evidence in this case which in their Lordships' opinion detracted to some extent from the weight of his testimony, may be briefly referred to. For instance, the expert here was unable to point to any such marked peculiarities in the ordinary writing of the accused which were reproduced in the forged documents, as the accused would be unable to avoid. Again, the expert, in comparing the group of admitted writings with that of the disputed ones, knew what the prosecution wished to be proved. At the preliminary inquiry he had expressed an opinion that the documents in question were in the hand-writing of the accused, but gave his reasons only at the trial before the Sessions Court. Reference was made to the cases of *Lalta Prasad v. Emperor* (1), *Srikant v. King Emperor* (2) and *Kali Charan v. King Emperor* (3), to show how unsafe it is, as a general rule, to base a conviction on such expert evidence.

(1) (1910) 11 Cr. L. J. 114.

(2) (1905) 2 All. L. J. 444.

(3) (1910) 6 All. L. J. 181; 9 Cr. L. J. 498.

1918.

I. L. R. 85 All. 265.

Kasturi

c.

Ohlanji Lal.

Griffin & Chamler,

J.J.

Hindu Law—Marriage of a girl without the consent of legal guardian—Factum valet.

This was an interesting case. A Hindu girl of 16 years of age was married by her maternal grand-father and maternal uncle. The marriage was effected, without force or fraud; but against the wishes of her paternal uncle and paternal cousins. These paternal relations, who were the legal guardians of the girl, wanted to make a profit by marrying her to a rich but one-eyed man. The question arose in these circumstances, in a suit brought by the husband for the restitution of conjugal rights, whether the marriage was valid. On the findings it was doubtful if the relations who gave the girl in marriage were her natural guardians, so that the case could not be brought within the rule of law which is pretty well settled, that if a girl is married by her natural guardian even without the consent of her legal guardian, and the marriage actually takes place, it is irrevocable. At the same time there was no authority which laid down that the marriage of a girl effected without the consent of the legal guardian was invalid. On the other hand, it has been held in *Khushalchand v. Bai Mani* (1), that such consent is not of the essence of the marriage. Their Lordships, therefore, felt no hesitation in applying the doctrine of *factum valet* to this case, and upholding the marriage.

(1) (1886) I. L. R. 11 Bom. 247.

The Calcutta Law Journal.

VOL. XVIII. }

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{ No. 8.

EXTINGUISHMENT OF EASEMENTS BY IMPOSSIBILITY OF USER.*

Suppose that the owners of Blackacre have a right to use a well or wharf situated on Whiteacre. It is manifest that a right to pass and repass over Whiteacre to the well or wharf is an incident of the easement. Suppose that the wharf is destroyed by the act of God or taken by eminent domain; what is the effect on the right to pass and repass? Suppose that the owner of the well wrongfully destroys it, what is the effect, if any, on the easement? Or, to put the problem in another way, what is the effect of impossibility of user upon an easement?

An easement is a liberty, privilege or advantage, without profit, which the owner of one parcel of land may have in the lands of another. It is a right of land against land. It runs with the dominant tenement against the servient tenement. Hence a true easement has three necessary elements; a parcel of land to which it is appurtenant, the parcel of land which is subject thereto, and the right itself, whatever it may be. It is true that some States permit the creation of an easement in gross (1)—that is, a right without profit which a given individual may have in the lands of another. The cases supposed, however, will apply with equal force to easements in gross. The distinction, therefore, between true easements and easements in gross need not be further considered.

I.

An easement may be appurtenant to the fee (2), or to some lesser estate, such as an estate for life or years. It may also be appurtenant to a particular structure on the land, as distinguished from the land itself. Indeed, the right may even be appurtenant to a portion of a structure such as the second story of a building (3). The distinction between an easement appurtenant to the fee, and an easement appurtenant to some lesser estate or to a particular structure is vital. It is clear that the easement can be no greater than that to which it is appurtenant. If the estate to which the easement is appurtenant determines or if

* Columbia Law Review Vol. XIII p. 497.

(1) 14 Cyc. 1140.

(2) *Weiss v. Meyer* (1891) 55 Ark. 18

(3) *Hahn v. Baker Lodge* (1891) 21 Ore. 30.

- the thing to which it is appurtenant is destroyed the easement must of necessity perish for want of a dominant estate.

In *Weis v. Meyer* (1) the owners of Lot A. had an easement to land upon Lot B., which touched the Mississippi river. The river washed away the dominant tenement. Held, that the easement was thereby extinguished.

In *Hoffman v. Savage* (2) a right of way was appurtenant to a dower estate. Held, that the death of the dowager terminated the easement.

In *Day v. Walden* (3) a right of flowage was appurtenant to a particular mill structure. The mill burned. Held, that the easement of flowage determined.

In *Cotting v. Boston* (4) a right of way was appurtenant to a particular store. The owner of the dominant tenement pulled down this store and erected a new one in its place of exactly similar dimensions. Held, that the easement was thereby ended.

In *National Guaranteed Manure Co. v. Donald* (5) an easement to take water was appurtenant to a particular canal. Held, that the right ceased when the canal was filled up.

In *Hahn v. Baker Lodge* (6) the plaintiff conveyed to the defendant the second story of a certain building with a right of way to such second story. The building burned. Held, that the right of way determined.

II

The nature and extent of the servient estate may vary like the nature and extent of the dominant estate. Sometimes the fee itself is made subject to the right of the dominant tenement. On the other hand, the servient tenement may be only an estate for years (7), or the right may be a limited one such as to maintain a railway or a railroad crossing (8). Again the right may be only to use a present existing structure such as wharf (9), a privy (10) a well (11) a stairway, a party wall, or a chimney (12). Thus the link which binds the dominant to the servient estate may be of varying strength or permanence. Destruction of this link, like destruction of the dominant tenement or estate, is fatal to the easement.

(1) (1891) 55 Ark 18.

(4) (1909) 201 Mass. 97.

(2) (1818) 15 Mass. 180.

(5) (1859) 4 Hurl. and N. 8.

(3) (1881) 46 Mich. 375.

(6) (1891) 21 Ore. 30.

(7) *Newhoff v. Mayo* (1891) 48 N. J. Eq. 619.

(8) *In re Railroad Commissioners* (1897) 91 Me. 135.

(9) *Central Wharf v. India Wharf* (1878) 123 Mass. 537.

(10) *Hancock v. Wentworth* (Mass. 1843) 5 Metc. 446.

(11) *Ballard v. Butler* (1849) 80 Me. 94.

(12) *Canny v. Andrews* (1877) 123 Mass. 155.

Thus in *Central Wharf v. India Wharf* (1) the destruction of a dock by eminent domain was held to terminate the right to use it or any part of the servient tenement.

In *Ballard v. Butler* (2) even the wrongful destruction of a well was held to have determined the easement to use it.

In the same way a right to use a particular stairway ends with the destruction of the stairway, even though a similar stairway replaced it.

Again where two buildings have a mutual easement of support in a party wall, destruction of the wall terminates the easement and neither party may rebuild the wall without a fresh agreement. On the other hand, if the wall be injured, but not destroyed, it may be repaired, though the decisions are conflicting as to the effect of destruction of the buildings leaving the wall fit for use after repairs.

III.

As has been already shown termination of the dominant or of the servient estate ends the easement. In the one case there is no estate which can claim the easement; in the other there is no estate on which the right can operate. The same result was held to follow where the right was appurtenant to a particular structure or a particular structure was servient thereto. Here, of course, destruction of the structure did not render user of the easement absolutely impossible. A similar structure might replace it and user go on precisely as if no accident had occurred. But private easements are not favoured by the Courts because of their restrictive character. They run with the land and burden it. Consequently the Courts have been very ready to find that the parties intended to restrict the right to some particular structure which ultimately would be destroyed and thereby relieve the land of what might otherwise be a perpetual servitude.

The same tendency is apparent with respect to the incidents of an easement. Thus a right to use a particular structure on the servient tenement necessarily includes as an incident a right to pass and repass to such structure. If the particular structure be destroyed, as has been shown, the right to use it ceases. But the right to pass and repass thereto may have been of considerable incidental benefit to the dominant estate. Yet the incidental right is held to cease with the principal right.

In *Freedom v. Norris* (3) the town of Freedom had a right to pass and repass over the land of Norris to a landing on the

(1) (1878) 123 Mass 557.

(2) (1849) 80 Me 94.

(3) (1891) 128 Ind. 377.

- White River. Commerce ceased on the White River and the landing was abandoned. Held, that the right to pass and repass determined.

In *Willard v. Calhoun* (1) the plaintiff owned the west third of a certain building, the defendant owned the middle third and one Brown the east third. The plaintiff had an easement of passage over a stair on Brown's land and through the hall on Calhoun's land to the upper floor of his third of the building. By certain foreclosure proceedings the right to use the stair was lost, but the plaintiff brought a bill in equity to restrain Calhoun from obstructing user of Calhoun's hallway. Held, that the right to use the hallway determined with the right to use the stair.

In *Mussey v. Union Wharf* (2) the plaintiff had an easement of passage for vessels over flats to and from his land. The city of Portland laid out a street between the plaintiff's land and the water which prevented vessels from reaching plaintiff's land. The defendant proposed to build a wharf on the flats beyond the street. Held, that the plaintiff's easement ceased when the street was laid out.

In *Hancock v. Wentworth* (3) the owner of certain premises had the privilege of using certain privies on Mill Creek, together with a right to pass and repass thereto. The city of Boston laid out a street over the land on which the privies stood and destroyed them. The Court in an elaborate *dictum* intimated that the incidental right to pass and repass ceased with the destruction of the privies.

In *Central Wharf v. India Wharf* (4) the defendant, who owned an open dock, granted the plaintiff the use thereof together with free ingress and egress thereto. The deed further provided that no building should be erected within the bounds of the dock. Thereafter the city of Boston constructed a street between the shore line and the dock and filled up the dock. The defendant then built on the land so filled and the plaintiff brought an action of tort for disturbance of his easement. The Court held that the construction of the street rendered user of the easement impossible and thereby extinguished it; and that the right of ingress and egress, and also the right to have no building erected within the dock were incidents of the principal easement and determined therewith.

In *Bangs v. Potter* (5) the common grantor of plaintiff and

(1) (1886) 70 Ia. 850.

(2) (1856) 41 Me. 31

(3) (Mass. 1843) 5 Metc. 446.

(4) (1878) 123 Mass. 597.

(5) (1893) 185 Mass. 245.

defendant sold certain lots with reference to a plan which reserved a strip fourteen feet wide between the lots for a spur-track. The grantees received the fee in this strip subject to the use for the track. The use of the spur-track was abandoned but the strip remained open and was used as a way, though not long enough to give a prescriptive right to such use. So long as the strip remained open the various lots were benefited by the additional light and air. The defendant built on his part of the fourteen foot strip and the plaintiff brought a bill in equity to restrain him. Held, that the easement reserved was for a spur-track only, and when this use was abandoned all restriction upon the use of the strip ceased.

In *Day v. Walden* (1) the plaintiff had a mill to which was appurtenant an easement to maintain a dam for water-power. The mill burned, and the defendant (owner of the servient tenement) removed the dam whereupon the plaintiff brought an action on the case. Held, that the easement was appurtenant to the particular mill structure which burned and ceased therewith.

Cooley J. said : "Such a grant, in its enjoyment, is as permanent only as the creation of which it is an incident, and necessarily as unstable. Like the natural phenomenon of the shadow cast by a substance, it vanishes when the substance disappears."

In *Hahn v. Baker Lodge* (2) the plaintiff conveyed to the defendant the second story of a certain building together with a right of ingress and egress thereto. The building burned. Held, that all interest which the defendant had in the soil determined and with it the right of ingress and egress.

In *Southern Ry. Co., v. Memphis* (3), the defendant city granted to the plaintiff the right to construct and operate in certain streets a single track street railway "by horse or other animal power." After the tracks were laid it was found impossible to operate the railway by horse or other animal power by reason of the steepness of the grade. For a time the city permitted the plaintiff to use a small dummy engine but subsequently withdrew this permission and proposed to tear up the tracks, whereupon the plaintiff brought a bill in equity to prevent such removal. The bill was dismissed upon the ground that since operation in the prescribed manner was impossible the incidental right to maintain the tracks also ceased. Lurton, J., said :

(1) (1881) 45 Mich. 575, 586. (2) (1891) 21 Ore. 80.

(3) (1899) 97 Fed. 819, 821.

"That which is only accessory cannot subsist when the principle right is lost."

IV.

An easement to use a particular structure ceases when the structure is destroyed. The continuance of the structure is really an unexpressed condition of the easement. Contracts touching a particular subject matter are subject to a similar condition. But the condition may happen in various ways. The structure may be destroyed by the act of God, by the wrongful act of a third party, by eminent domain or by the wrongful act of either party to the easement. As has been already shown destruction of the structure by the act of God, by eminent domain or by the act of the owner of the dominant tenement terminates the easement and its incidents. By analogy the same result should be reached where the structure is destroyed by the wrongful act of a third party. In all these cases the condition has happened without any fault on the part of the owner of the servient tenement. While therefore, the wrong-doer may be held responsible in damages (1) and compensation may be obtained in eminent domain proceedings no right either in law or in equity continues against the servient tenement.

Suppose, however, that the servient structure be destroyed wrongfully by the owner of the servient tenement. It is still true that the condition which terminates the easement has happened. Yet it has happened by the wrong of the party whose estate is subject to the easement. One case intimates that, at law the easement has determined (1). But the rights of the parties in equity seem to be open upon the authorities.

The question involves several conflicting principles. In the first place it is a familiar maxim that a man shall not profit by his own wrong. But this maxim would scarcely enable the chancellor to decree that the easement should be appurtenant to the fee. Such a decree would give the dominant tenement an absolute easement instead of a conditional one. Moreover, it would by judicial decree make for the parties a bargain which they never made for themselves. Cases touching the reformation of instruments declare that the chancellor has no power to make a contract for the parties. It may well be doubted, therefore, whether the Court could properly make such a decree.

The same argument applies in principal to a decree which

(1) *Ballard v. Butler* (1849) 80 Mo. 94.

would compel the restoration of the structure destroyed. The contract of the parties attached the easement to a particular structure. That structure has ceased to exist. No power can bring back *that particular building*. The most that can be done is to create a *new building* which is precisely similar. But the parties have not attached the easement to this new building. To forge the connecting link a new bargain is required. True, it may be urged that easements are created by prescription. To this extent the law does in effect make a contract for the parties—upon the somewhat violent fiction that adverse user for the prescriptive period is evidence of a lost grant. But this is an anomaly which would scarcely warrant the chancellor in making a new bargain for the parties.

Moreover, another principal or rather practice of Courts of Chancery points to the same result. Equity is very slow to assume the burden of superintending the erection of structures. It is true that equity in a clear case may compel the removal of a structure. But that is the converse of the problem here. Moreover destruction involves far less superintendence than construction. And in this case the construction (if ordered) raises problems of peculiar nicety since the new building must exactly correspond to the old. In one case, it is true, equity, did order the installation of a heating apparatus (1). But this case comes very close to the boundary of affirmative relief. It seems likely therefore, that this practical consideration would weigh heavily with the chancellor.

In view of these conflicting principles even a tentative prophecy seems of doubtful value. The most that can be said is that each case must be rested on its own particular facts. If the injury to the plaintiff were great and irreparable, and if the Court could efficiently grant relief it may be that the Court would set off the wrong of the defendant against the impropriety of making a contract by judicial decree. But if damages would substantially compensate the plaintiff, the Court would have a strong tendency to overlook some inadequacy in the relief and leave the plaintiff to his remedy at law.

In summary then we have the following propositions.

1. Where an easement is appurtenant to an estate less than a fee, or where an estate less than a fee is subject to the easement, termination of such estate, determines the easement also,
2. Where an easement is appurtenant to a given structure as

(1) *Jones v. Parker* (1895) 168 Mass 564

distinguished from the fee, or when a given structure as distinguished from the fee is subject to an easement, destruction of such structure by the owner or by the act of God, or by operation of law, extinguishes the easement.

3. Where a limited easement for a particular purpose is created and user of such easement is either originally impossible, or becomes impossible, by the act of God or by operation of law, the easement is thereby extinguished.

4. Where an easement consists of a principal right and certain incidents, determination of the principal right determines the incidents also even though such incidents, if continued, would be beneficial to the dominant estate.

5. If the owner of the servient tenement should wrongfully destroy such tenement, the extent to which equity will lend its aid to compel him to restore the tenement and thereby revive the easement is still uncertain upon the authorities and must be decided in the light of general principles and upon the particular circumstances of each case.

EDWIN H. ABBOT, JR.
BOSTON.

NOTES ON CASES.

1918.
I. L. R. 35 All. 247.

Ganesh Lal
v.
Charan Singh.
*Griffin & Chatter
JJ.*

*Mortgage suit—Omission to implead certain persons interested—
Proportionate Decree.*

The plaintiffs sued for recovery of the whole of the mortgage money by sale of the whole of the mortgaged property. The defendants were the mortgagors, and some persons who had acquired an interest in a share of the mortgaged property by purchase. By an oversight the plaintiffs omitted to implead certain other persons who had similarly acquired the remaining share in the property after the mortgage. It was held that the non-joinder of these other persons was not fatal to the suit, but that so much of the claim should be decreed as was proportionate to the interest of the persons who were before the Court.

1918.
I. L. R. 35 All. 260.

Parshotam Das
v.
Patwari Partab
Narain Singh.
*Richards C. J.
& Banerji J.*

*Indian Registration Act, Section 21—Wrong description of property
—Mistake in name of tappa.*

In a registered mortgage deed comprising several villages, one of the villages was described as being in a wrong tappa. The names of the pargana and the district in which the village was situate were, however, correctly given, and there were other particulars in the deed which were sufficient for identification of the property. In these circumstances, the Court declined to

hold that the registration of the deed was invalid under section 21 of the Registration Act. That section merely requires that a non-testamentary document relating to immoveable property should contain a description of such property sufficient to identify the same.

Suit against Secretary of State—Notice—Civil Procedure Code, Section 80.

It is held in this case that though the notice under section 80 of the Civil Procedure Code in a suit against the Secretary of State for India in Council need not be signed by all the plaintiffs, where there are more than one, [*Secretary of State v. Perumal* (1)], the notice must yet state the names, descriptions, and places of residence of all of them. Otherwise the notice will be insufficient. It is competent, however, to the Secretary of State to waive the notice, and he may be estopped by his conduct from pleading the want of notice at a late stage of the trial. For the object of the notice under section 80, see *Manindra Chandra Nandi v. Secretary of State* (2).

Indian Penal Code, Secs. 147, 323—Legality of separate sentences.

The legality of separate sentences under sections 147 and 323 of the Indian Penal Code, for rioting and hurt respectively, was questioned in this case on the authority of the Full Bench decision of *Nilmony Poddar v. Queen Empress* (3). It was pointed out, however, that that case merely held that such sentences were illegal where it was found that the accused persons individually had not caused hurt, but were guilty of that offence under section 149. Where, on the other hand, it is found, as in the present case, that the accused took an individual part in the assault, the cumulative sentences would be legal. For authority, vide *Mohur Mir v. Queen Empress* (4) and *Ferasat v. Queen Empress* (5).

Application for Review—Res Judicata—Civil Procedure Code, section 11.

By a mistake in a deed of compromise which terminated a partition suit, some property which was meant to be kept as joint property happened to be allotted to certain persons. Plaintiffs applied for a review of judgment to rectify this error, but were unsuccessful. They then brought the present suit for a

1912.

I. L. R. 40 Cal. 508.

Bhola Nath Roy

v.
Secretary of State.*Mookerjee and
Beachcroft JJ.*

1913.

I. L. B. 40 Cal. 511.

Ram Angatha

v.
Emperor.*Sharfuddin and
Coco, JJ.*

1913.

I. L. B. 40 Cal. 541

Bish Chandra

v.
Triguna Prasad.*Holmwood and
Okeyman JJ.*

(1) (1900) I. L. B. 24 Mad. 279.

(2) (1907) 5 O. L. J. 148.

(8) (1889) I. L. B. 16 Cal. 442.

(4) (1889) I. L. B. 16 Cal. 725.

(5) (1891) I. L. B. 19 Cal. 105.

declaration that the compromise was erroneous and for a rectification of the same. The parties to the suit were the same as the parties to the application for review. The question arose, whether the suit was barred by *res judicata*. It was held that an application for review is not a "suit" within the meaning of section 11 of the Civil Procedure Code, and that neither that section nor any doctrine of constructive *res judicata* could rightly apply to a case of this kind. *Gulab Koer v. Badshah Bahadur* (1).

1913.

I. L. R. 40 Calo. 587.

Indra Chandra
v.
Sriish Chandra.
*Garnduff and
Beachcroft JJ.*

*Small Cause Court suit—Tried as an ordinary suit—
Jurisdiction.*

A Munsif invested with Small Cause Court jurisdiction tried a suit cognizable by a Court of Small Causes in the ordinary way, and not under the summary procedure provided for the trial of such suits. Would the trial be without jurisdiction? Good sense suggests an answer in the negative, and their Lordships also felt no difficulty in answering the question in the same way. For authority in support of this view, reference may be made to *Shankarbhai v. Somabhai* (2), where it was held that under such circumstances the character of the suit is not altered, and the decree in it does not become appealable.

(1) (1909) 10 C. L. J. 420.

(2) (1900) I. L. R. 25 Bom 417.

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No. 4.

NOTES ON CASES.

Action for Negligence—Malicious Act of a third person—Fletcher v. Rylands explained.

J. O.
[1918] A. O. 268.

Blackards
v.
Lothian

Per
Lord Moulton.

The question in this case was whether in an action for negligence plaintiff could recover, where it was found that the damage was caused by the malicious act of a third person against which precautions would have been inoperative. Plaintiff was the tenant of the second floor of a house under the defendant, and had his goods damaged by the continuous overflow of water from a wash-hand basin in a lavatory situated on the third floor. The jury found that this was caused by the malicious act of some person in turning on full the water-tap and in plugging up the waste-pipe with various articles. The only negligence on the part of the defendant was found to be the omission to provide against accident by placing a lead safe under the lavatory for the escape of overflow water, but it was not put to the jury—and there was no finding on the question—whether the defendant ought reasonably to have anticipated the likelihood of the particular mischievous act which caused the damage, so that it became his duty to take precautions to prevent the same. The main argument on behalf of the plaintiff consisted in an attempt to bring the case within the principle of the well-known decision of the House of Lords in *Fletcher v. Rylands* (1). It was clear that on the findings plaintiff could not succeed as in an ordinary action of negligence. For, to support such a cause of action, it ought to be shown that the proximate cause of the damage was the negligence of the defendant. Here, however, the proximate cause was found to be the malicious act of an unknown person.

On the principle of *Fletcher v. Rylands* (1) it was contended that irrespective of any negligence on the part of the defendant or of the malicious act of a third person, defendant would be liable, as he owed an absolute duty to the plaintiff to prevent an overflow from the basin, however caused. The argument, however, was not accepted.

The rule of law was thus laid down by Blackburn J. in that case:—"The true rule of law is that the person who, for his own

(1) L. R. 3 H. L. 880; L. R. 1 Ex. 265.

purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." And then his Lordship went on to add— "He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here it is unnecessary to inquire what excuse would be sufficient." The inquiry which was left out as unnecessary here came to be made in a subsequent case, where the exceptions to the general rule indicated by Blackburn J. were discussed and stated more fully. Mellish L. J., delivering the judgment of the Court of Exchequer Chamber, in *Nichols v. Marsland* (1) observed:— "A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant." To the same effect were the observations of Kelly C. B. in a later case, *Box v. Fubb* (2):— "The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called *vis major* or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence."

Following these authorities, the Judicial Committee felt no hesitation in declaring in the present case that the exception to the principle of *Fletcher v. Rylands* (3) applies as much to a case where the damage is due to "*vis major* or the king's Enemies" as where it is due to the malicious act of a third person.

(1) 2 Ex. D. 1.

(2) (1879), 4 Ex. D. 76.

(3) L. R. 8 H. L. 330; L. R. 1 Ex. 256.

REVIEWS.

The Calcutta Improvement Act. By BIJON LAL MUKHERJEE B. L., AND JATINDRANATH GHOSE B. L., R. CAMBRAY AND CO., CALCUTTA, 1913.—The public will welcome this very handy edition of the Calcutta Improvement Act. The text is reproduced with brief notes and cross references. The appendix furnishes the statement of objects and reasons which indicates the purpose of various provisions of the Act. The Act is likely to affect a great many persons and this convenient edition is very opportune.

The Transfer of Property Act. BY ATULKRISHNA RAY, B. A., B. L., VAKIL, HIGH COURT, CALCUTTA. R. CAMBRAY AND CO. CALCUTTA, 1913.—The Transfer of property Act has been repeatedly annotated and there are in the field many ambitious commentaries. Yet there is room for a handy edition in which the effect of the judicial decisions on the subject is concisely and accurately stated. The work before us will meet a recognised want. We have here in a comparatively small compass an adequate commentary on the Statute in which the effect of the case law on the various sections is admirably stated. There are a few misprints here and there, but they are usually of no practical consequence. The arrangement of the notes is logical and the work will prove useful to the student as well as to the practitioner.

All India Century Digest. CIVIL 1811-1912 BY B. R. DESAI, BARODA, 1913.—This great Digest continues to make satisfactory progress. The eighth volume now before us contains the headings from Measure of Damages to Death of Plaintiffs. The most important subjects dealt with are Mortgages, Onus of Proof, Parties, Partition, Partnership and Plaint. We have tested the work in several places and found the references correct. The statements as usual are full and accurate.

The Indian Decisions. New Series, Allahabad, Volume VI. LAW PRINTING HOUSE, MADRAS, 1913.—This volume gives a verbatim and continuous reprint of all the cases contained in the Indian Law Reports, Allahabad Series, Vols. X, XI and XII. The reprint is in some respects more convenient than even the original edition. The print is clearer and the index fuller, while the volume occupies about one-third of the shelf space. We have no doubt that this venture will meet with a cordial welcome from all members of the profession.

The Civil Court Practice and Procedure. BY ATUL CHANDRA GANGULI, M. A., B. L., CALCUTTA WEEKLY NOTES OFFICE, 1913.—The value of this book cannot be judged from its size. In a very small compass it gives a considerable amount of valuable information on various points of practice and procedure in civil Courts. Students as well as practitioners, whether young or old, will find that a careful study of this book will save them from many a pitfall. The Bengali appendix is of special value and the

forms are characterised by accuracy and clearness. The work ought to have a large circulation amongst all branches of the profession.

Students' Guide to the Civil Procedure Code. BY ALEXANDER KINNEY, THACKER, SPINK AND CO., CALCUTTA, 1913.—The great difficulty which our students find when they first try to master the Civil Procedure Code is the enormous mass of details which are familiar to every practitioner, but are admirably calculated to puzzle the novice. Mr. Kinney has done a service to the cause of Legal Education by this handy volume in which he gives a general outline of the principles of Procedure. The entire subject is mapped out with great clearness and we have a statement admirably calculated to impress upon the student of Procedure every important principle that he can be expected to master. We trust the book will be brought to the notice of our students by gentlemen engaged in the teaching of law.

Guide to our Muffassil Court by P. N. DUTT, M.A., B.L., CALCUTTA, 1913.—Mr. Dutt is a Lawyer of extremely varied and valuable experience and the work before us bears ample evidence of this circumstance. We have here a clearly written and well-arranged statement of the Rules of Practice as they obtained in the Muffassil Court. If every practitioner will make a careful study of the various points noted herein, there will be less chance of capture in a pitfall and ruin to an innocent client. References are given everywhere to the authorities, whether they are to be found in Statutes, Statutory Rules or in important Judicial decisions. The book, as we have said, is of real value, not merely to the beginner in practice, but also to more experienced persons.

The Indian Decisions, New Series, Calcutta Vols I & II, LAW PRINTING HOUSE, MADRAS.—These two volumes reproduce the first five volumes of the Calcutta Series of the Indian Law Reports. This is a verbatim re-print and may be used with as much facility as the original edition. But there are two distinct advantages in the re-print as references are given to subsequent decisions and the index is decidedly an improvement. As regards the get-up it is sufficient to say that the volumes are worthy of the well-known Madras establishment.

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No. 5.

ORIGIN OF OCCUPANCY RIGHT IN BENGAL.

To trace the origin of the right of occupancy, we have to look to the origin of the land tenure system. There are divergences of opinion amongst the jurists as to its origin, and some of these contradict each other. Taking Maine's theory of *patria potestas* as the basis, the origin of the land tenure system in India may be thus traced. In ancient time, there was plenty of land, and the population was fixed, so that there was not sufficient number of men to hold all the land. India, with her vast expanse of land, laid herself bare before the population of her soil. The Aryans came with their developed civilization, and the modern research unveils to us the existence of some sort of civilization amongst the non-Aryans also. The inhabitants of India, from a very long time, knew the art of cultivation of land.

Origin based on
patria potestas.

Lands being plenty, men looked upon these as *res nullius*. They seized upon as much land as they liked, and as much as they could cultivate to meet their wants.

Land as *res nullius*.

This necessarily did not restrict to the holding of one and the same piece of land every year. They seized any piece of land which each of them found convenient, and cultivated it for produce. There was thus no proprietary right over the land, and no idea to the same effect arose till then.

But necessity brings in new method. As men increased in number, some sort of unity must come in, amongst them. Demands for land increased, and people would seek to gather land, as much as they can for their necessity, and to keep it in their own possession. Thus dispute would arise for holding of land, and one man would try his best to wrench lands from the hands of the weaker one. People would thus seek for help to protect their own right, and they would very naturally seek for such help from their blood relations. Thus it is, that families were formed with *pater familias* as its head. Trace of this is to be deduced from the *gotra* or *prabara* system in India. Men belonging to one of such families came to be denominated as belonging to one *gotra*, and the *gotra-nama* is derived from some one of the influential *pater familias*. This family system,

Formation of
family system which
developed into Clan
system.

Land came to be
res communes.

which developed into clan system, existed in ancient India, and some trace of this can be found in some of the aboriginal tribes of Chota Nagpur and Assam. Land became the common property of men forming one clan. Thus from *res nullius*, land came to be considered as *res communes*. This family or clan was a little republic, each individual having no right over any particular piece of land, but the land held by one clan, was the common property of the men who formed that clan. This clan system came to be dwindled into our joint family system in later times. There was no idea of rent up till then, and the men of the clan cultivated the land and hoarded up the produce and used these for their common benefit. In patriarchal family system the defendants could not earn anything to their own benefit, and their earnings (*peculium*) became the property of the *pater familias*. Primitive society was an aggregate of families, and village communities sprung up with such families as units.

Hostilities amongst
the Clans Similarity
with Teutonic
Village System.

There being yet plenty of land occupied by each clan, there was no dispute amongst the different clans. But soon such dispute arose. This arose, primarily for carrying away girls of one clan for being married by men of the other clan. The hostilities between one family with another for marriage, is due to the idea of marrying outside the family, and which Mr. McLennan calls exogamy. This idea still lingers with the Hindus and they are forbidden to marry within six degrees from the mother's side and eight degrees from the father's side. There were not men enough to occupy the whole land, and a large quantity of it remained fallow; and the similarity of Teutonic village system of dividing the lands into mark of the township or village, the common-mark or waste, and the arable mark or cultivated areas, can be traced in India in these days. Lands do not form the property of a single individual, but of the family, and the remnant of it is still to be seen in countries governed by the Mitakshara law.

Hostilities amongst
the Clans. Sons
longed for.

As time went on, one clan developed in number more than the other. The clan having larger number of inmates would naturally like to get more land taken out from the hands of the other clan to get more produce. Moreover, they would try to increase the productive power of their own lands. Different clans existed side by side and they acted as contending parties, carrying on perpetual hostilities. Mr. Mayne says, "in modern times, children are a luxury to the rich, and encumbrance to the poor. In early ages female offsprings stood in the same position,

but male issue was passionately prized. The very existence of a tribe, surrounded by enemies, would depend upon the continual multiplication of its marks." Thus male issues were longed for, and they were procreated by means, which now-a-days can not but be called lust and infamy. Society at that time tolerated it, and even "Kshetraja" sons were recognised as legitimate.

We have seen that the exigencies of circumstances led the clansmen to give attention to the productive power of the soil and to the security of their land, as also to the acquisition of lands from other clans. There was feud going on, not merely between different clans, but between the Aryans and the non-Aryans. This sort of feud is traceable in all ancient countries. Thus we find in Rome, a continual feud went on between the Patricians and the Plebians till in later times the Tribune secured to the Plebes a share in the State domains. The same contest in England, in ancient time, was found between the Normans and the Saxons, till Agrarian laws were framed to protect the latter.

Feud between different clans, and between the Aryans and non-Aryans.

To increase the productive power of the land, special attention must be given to cultivation. Up till now, men of each clan did all works necessary to keep the machinery of their then republic going, and there was no division of labour. But to do anything special, one must give special attention to it. Thus it became necessary for some of the men of each clan to give their whole attention to cultivation and to engage themselves in that art. In India, we find everything turns hereditary, and generally a class of men arose who from generation to generation took to the avocation of cultivating lands. In this manner seed was sown for the origin of the Vaisya caste.

Cultivator as a separate class.

The other necessity of these little communities is to keep their own lands safe in their own hands, and to conquer land from other clan's holding and join it with theirs. Perpetual hostilities went on amongst these clans and with the non-Aryans. This necessitated a certain number of men of each clan, to pay exclusive attention to warfare, which in course of time became their profession; and they subsequently became the Kshatrias of India. The cultivators produced crops for the whole clan, and the produce was appropriated by all the members of the clan.

Origin of the warrior class.

As population further increased, clansmen gradually became dispersed, and tie of blood amongst them became loose, as it must be so generations after. The nearer blood relations are called *Sapindas*, and the remoter ones are called *Samanodakas*, but

Clans divided into families.

further on there was practically no tie. Thus the clan or community must divide into its units, the families, consisting of those men only who were united together by tie of kinship, and the land was held by each family according to the distinct portion actually under their cultivation.

Internal disputes.
Origin of transfer of
land by consensus of
parties.

Up to this time, military force was necessary for the protection of clansmen from external enemies. But as land became more valuable, and population more and more increased, some families which were originally small, and so held less quantity of land than other families, came to be a big one, having large number of members. To maintain themselves, they would naturally require larger quantity of land than they had. Thus internal disputes and transfer of land by consensus of parties came into being.

Origin of Kingship.

This internal and external protection was in the hands of the military men. Men having powers in their hands came to exercise superior authority. They had the executive authority in their hands, and as it naturally happens, they became the rulers of the communities. They exacted a share of the produce from the cultivators which varied according to the soil and labour necessary to cultivate it, and thus from payment to an equal it came to be payment to a superior, in lieu of the protection they used to get from such ruler. Manu lays down that protection of subjects, gift, *jagya*, study and abstinence from all sorts of pleasure are the duties of the Kshatrias (1). These military families came to be the rulers, and the cultivators and the artisans were their subjects. But the rulers were, as we find in Manu, devoid of all sorts of pleasure and luxury, and the share of the produce came to be denominated *raj bhag* or the king's share, which became rent subsequently. The headman of the military family which happened to come to powers came to be denominated the king. But the prevailing tendency then was to supplant him and his family and to place in his stead the family which succeeded in supplanting the former one; and such instances abound in the Purans.

King's revenue.

The ownership of land was with the subject, and the King was to take a certain share in the produce as his revenue. "His other forms of revenue consisted of taxes on commerce, petty traders and shop-keepers, and of a forced service of a day in each month by handicraftsmen. The share of the produce was in

(1) Manu. Chap. I. Sloka 89

times of prosperity one-twelfth ; and in times of distress one-eighth, one-sixth (which is the medium), or in great public adversity even one-fourth" (1). Manu says, "a field is his who clears it of jungle, game is his who has first pierced it" (2). The same idea is found in the Digest : "Wild beasts, birds, fish and all animals which live either in the sea, the air, or on the earth, as soon as they are taken by any one, immediately become, by the law of nations, the property of the captor, for natural reason gives to the first occupant that which had no previous owner" (3). The same idea was expressed by the great Prophet of Arabia when he laid down that whoever cultivates waste lands does thereby acquire property in them (4). Sayana says "the soil is the common property of all and they through their own efforts enjoy the fruits thereof. Therefore it follows that though pieces of land belonging to particular individuals may be given away, the earth cannot be given away (even by the king) (5). Seton Karr, J., in *Thakurani Dassi v. Biswaswar Mukerji* (6) recognised the right of the raiyats, according to Hindu law, to beneficial interest in the soil. The same view was expressed by Turner, C. J., in *Secretary of State v. Vira Rayan* (7), who observes that according to what may be termed the Hindu common law, a right to the possession of land is acquired by the first person who makes a beneficial use of the soil.

Hankering for supremacy is the natural human instinct. The king who rose into power and had enough military force at his back would naturally seek to subdue other kings, and when his territories became too big for being supervised by him alone, he kept the conquered King in his own domain, settling only some revenue on him. He continued to rule in his own territories subject to the payment of revenue to his conqueror, whom he acknowledged as his liege lord. These superior kings were called Raja-chakrabarties, and they at times, held Rajasuya Jogya, in which all the subordinate Kings were invited to join and to do homage to the superior King. Thus an intermediate tenancy came into being. This is somewhat like the feudal tenure of England. Mr. Field in his Landholding (8) draws the origin of tenancy in Rome from the luxurious habits of the Romans which led them to let out their lands to tenants,

Subordinate Kings,
Intermediate ten-
ancy.

(1) Field on Land holding (2nd Ed.) p. 418.

(2) Manu, Chap. IX. V. 41.

(3) Digest, Chap. XLI, 11.

(4) See Mitra's Land Law of Bengal p. 2

(5) Nayanala Vistara, p. 858 quoted in Mitra's Land Law of Bengal p. 5.

(6) 8 W. R. Act. X, 29 at p. 76 (7) I. L. R. 9 Mad., 175 at p. 179.

(8) p. 5 (2nd Ed.)

who paid rent either in money or by delivering a fixed portion of the produce. Some of the writers are inclined to apply the same doctrine to India also, saying that the Aryans let out lands to non-Aryans for cultivation. But this is borne out by history. The non-Aryans were never classed above the Sudras, and Manu lays down (1) that slavery is their avocation. Cultivation of soil is the duty of Vaisayas, and the non-Aryans not being Vaisayas, cannot hold the land as tenants having right to the soil.

Complications in
land tenure system
in India.

With the advancement of civilization complications in land tenure system came in. This has been depicted by Mr. Justice Campbell in his judgment in the case of *Thakurani Dassi v. Bisweswar Mukerji* (2) known as the Great Rent Case, in the following way ; "The primitive state of society, which gave the first occupier a right to continue in occupation and no more, could not last long. Complications must necessarily arise and did as a matter of fact arise, and Hindu sages had to grapple with the relation which the ever-developed state of things required them to deal with. Thus from ancient Codes, as we come to the later ones, we find more complicated rules of land tenure are laid down. The Code of Parasara is the latest Code, and it was made for the Kali age, while the Code of Narada is of comparatively later origin. In both these Codes the relation of landlord and tenant is copiously dealt with. The land was with the subject and the king had right only to take a share of the produce for the protection he used to give to such tenants.

System of Govern-
ment under Maho-
medan conquerors.
Share of produce &
rent.

The Mahomedan conquerors had a system of government, in some respect similar to this. They used to take some revenue out of the produce of the soil. The first systematic attempt to commute the produce rent into money rent is to be found in the Institutes of Timur. But this method proving inefficacious, fresh assessment was made in the reign of Akbar by Todor Mal and Man Singh. It appears that the average produce of the bigha of land of each description was ascertained, and the Government share was then calculated, one-third being the full demand, and deduction being made for fallows, occasional inundations and draughts, inferior soils, &c. The average dues of the State (in grain) being thus ascertained, the grain rates were converted into money on an average of the price currents of the nineteen previous years, and the rates so obtained were

(1) Mann, Chap I, 91.

(2) 3 W. R. Act X, 20.

calculated on the land of each raiyat (1). Ayani Akbari states that husbandman had his choice to pay the revenue either in ready money or by *unkhut bhaoli*.

Rent or revenue was calculated from the tenants direct, either by paid officers of the Government or through the medium of zamindars, who were engaged by the Government to collect such rent either on a certain percentage of commission on the net collection made, or on a certain quantity of rent-free land being given to them as cost of their labour. Such rent-free lands were called *nankar* lands. The zamindars were mere farmers of land, and they had no right to the soil. Thus they came into being after the Mahomedan conquest.

Zamindars came into being after the Mahomedan conquest.

Leaving aside the historical facts about oppressions of raiyats by the zamindars for exactions of illegal cesses or *abwabs*, we see that the same state of things continued even after the acquisition of the Dewani by the East India Company. The Regulations made before the Permanent Settlement, reveal to us that rents were settled, from time to time, with reference to the produce of the land. A certain share of the produce per bigha was made payable to the Government and the rest was kept with the raiyat. The Government settled with the zamindars for the collection of rent, sometimes quinquennially, but generally annually. The zamindar, according to the preamble of Regulation II of 1793, after deducting the expenses of collection, paid over ten-elevenths of the net rent as revenue to Government, retaining the remaining one-eleventh as his zamindari profits. Again the preamble of Regulation XIX of 1793 lays down that by the ancient law of the country, the ruling power was entitled to a certain portion of the produce of every bigha of land (demanded in money or in kind according to local custom), unless it transfers its rights thereto for a term or in perpetuity, or limit the public demand upon the whole of the land belonging to an individual, leaving it to him to appropriate to his own use the difference between the value of such portion of the produce and the sum payable to the public while he continued to discharge the latter.

Collection of rent after the Dewani.

The periodical settlement with the zamindars for the collection of rent from raiyats were made permanent by Regulation I of 1793 and it enjoined (by section 4) 'that they and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever.' This Regulation, however, did not give to

Periodical settlement with the zamindars made permanent. Zamindars no proprietors of land.

(1) 8 W. R., Act X. 29 (55)

- the zamindar any absolute proprietary right over the land. They were enjoined "to conduct themselves with good faith and moderation towards their dependant taluqdars and raiyats." By Regulation VIII of 1793, undue exactions from them were prohibited. By section 60 of the same Regulation it is provided that the *pattah* of *khudkasht* raiyats are not to be cancelled, unless it is proved that rent paid by them within the last three years was reduced below the *nirikhbundy* of the *pergannah*.

Proprietary right was given to zamindars by Regs. XIX and XLIV of 1793.

Proprietary right was given to the zamindars by Regulations XIX and XLIV of 1793, and it was enjoined that "the zamindar is to appropriate to his own use the difference between the value of the proportion of the annual produce of every bigha of land which formed the unalterable due of Government according to the ancient and established usage of the country, and the same payable to the public." It further laid down that the zamindars will not be liable to be ejected from their estates, but that on failure to pay the revenue assessed on them, their estates, or portions of them sufficient to meet Government demand, will be brought to sale.

Government reserved right to make law for the protection of the cultivators. *Khudkasht* and *pykast* raiyats.

Though the permanent right to collect rent from tenants was given to the zamindars, yet the Government kept in its own hand the right to make laws for the protection of the cultivators and for their well-being. This reservation was kept in Regulation I of 1793 at the time of the Permanent Settlement. The raiyats were divided into *khudkasht* or resident and *pykast* or non-resident, at the time of the Decennial Settlement. *Khudkasht* raiyats are raiyats cultivating the land of their own village, or the village in which they reside (1). I cannot accept the explanation of that term as literal, as given in Wilson's Glossary. (2). There the term *khudkasht* raiyat has been described as "a cultivator of his own hereditary land," as contradistinguished from the land of his own village, though subsequently it acquired that import. This explanation of Wilson cannot stand, when taken into consideration with its antithesis, the *pykast* raiyat. Series of sale laws, beginning from Regulation VIII of 1819, lay down that purchasers at revenue sale shall not be entitled to eject a *khudkasht* raiyat or resident and hereditary cultivator. Thus, though the zamindars came to possess a proprietary right in the land, they cannot do away with the right of *khudkasht* raiyat. Savigny says that proprietary rights are acquired by "adverse possession ripened by prescription." Regulation XI of 1822 made distinction between *khudkasht* raiyats who were in existence

Zamindar could not do away with the right of a *Khudkasht* raiyat.

before the Settlement, and those who originated subsequent thereto. Those who were in existence before the settlement, were owners of the land, and they acquired proprietary right in the same. The Regulations XIX and XLIV of 1793 gave the proprietary right to the zamindar. Applying the doctrine of *factum valet*, it seems that the fact, that the *khudkasht* raiyats had right in the land, cannot be altered by the text of the Regulations XIX and XLIV of 1793. Thus the *khudkasht* raiyats had right in the land and is not a mere tenant-at-will, liable to eviction with the destruction of the right of the zamindar on it.

Application of the doctrine of *factum valet*.

Mr. Field in his report of the rent commission states "I think that the law on this point before Act X was not certain, and that the task of restoring that law is now almost an impossible one. The village community, if it ever existed in lower Bengal, has long been broken up, and the definition of a village would raise insuperable difficulties. Doubtless this was felt by the framers of Act X of 1859, and influenced them to abandon the element "residence in the village." The effect of this was to extend privilege and protection to the *pykasts*, and the selection of 12 years as necessary period of prescription for occupancy did not of itself cut down the rights of any *khudkasht*." According to the Hindu and Mahomedan laws, a title to property is acquired by 12 year's user, which Trevor J., in the Great Rent case, calls a right created by "negative prescription." The same learned Judge states further "hence the doctrine which has obtained, that *khudkasht* raiyat in possession for 12 years before the settlement were under no circumstances, not even on a sale for arrears of revenue, liable either to enhancement of rent or eviction from their holding, so long as they paid the rents which they had all along paid."

State of law just before Act X of 1859.

Title to property by prescription.

The nature of the occupancy tenure of the raiyats before the passing of Act X of 1859 has thus been described by Rt. Hon'ble H. Mackenzie in his evidence before the Select Committee of the House of Commons in 1832. "They may be generally described as cultivators possessing a fixed hereditary right of occupancy in the fields cultivated by them, or at their risk and charge; their tenure being independent of any known contract, originating probably in the mere act of settlement and tillage; and the engagements between them and the zamindar or (in the absence of middle man) the Government Officers, serving, when any formal engagements are interchanged, not to create the holding, but to define the amount to be paid on account of it. They

cannot justly be ousted so long as they pay the amount of value demandable from them ; that being determined by local usage, sometimes by fixed money rates or at rates varying with the quantity of the land, or the nature of the crop grown—sometimes by the delivery of a fixed share of the grain produced—sometimes by estimate and valuation of the same—sometimes by other rules ; and what they so pay is in all cases distinctly regarded as the Government revenue or rent, whether assigned to an individual or not, in one depending on the mere will and pleasure of another.

Two schools of
opinion as to origin
of occupancy raiyats

Mr. Justice Campbell, in the Great Rent case lays down "it would seem to be assumed that the old raiyats and their descendants never had very high rights, that, whatever they were, they had for the most part died out ; that the occupancy raiyats of Act X of 1859 are, as a body, the creation of that Act ; and occupancy tenures must be treated as so created for the first time, and the Act continued as if it merely conferred certain limited tenant rights upon those who before held as tenant-at-will." Thus two opinions prevailed as to the origin of the occupancy raiyats. One school is of opinion that immemorial custom of the country gave rights of occupancy to all resident raiyats of the village who had in the earlier laws and regulations been vaguely styled *khudkasht* or *kadimi*. The representatives of the opposite school are of opinion that occupancy raiyats are the creation of Act X of 1859. From what has been said before, it is seen that a certain class of tenants kept in themselves the right to the soil which does not extinguish with the extinction of the right of the zamindars. Act X of 1859 (by section 6) conferred right of occupancy by 12 years' possession. Of course that statutory provision conferred their right upon *pykasts* also who fulfilled the conditions of the law laid down by that section. It is the customary right which originated the occupancy raiyats, though its scope was extended by the operation of section 6 of Act X of 1859.

KATWA.

SURENDRANATH RAY.

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NOTES ON CASES.

Criminal Procedure Code (Act V of 1898), Sec. 35 (3)—Concurrent Sentences not individually appealable—Aggregate of Sentences—Right of Appeal, if can be questioned, after admission of appeal.

The question in this appeal was whether an accused, who had been sentenced to concurrent terms of imprisonment, not one of which was individually appealable, had a right of appeal against them collectively. The view was taken in a recent case *Abdul Khalek v. King Emperor* (1) by Holmwood and Imam JJ. that for the purposes of appeal, concurrent sentences must be taken in the aggregate. In a later case, however, *Suknandan Singh v. King Emperor* (2), one of these learned Judges (Imam J.) sitting with Carnduff J. seemed to have changed his opinion. It was pointed out there that the word "aggregate" in subsection (3) of section 35 of the Criminal Procedure Code of 1898 connotes the combined effect of the different sentences passed. In the present case their Lordships Coxe and N. R. Chatterjee JJ. accepted this later view, and declined to follow the earlier decision.

There was another point in this case. The Sessions Judge to whom the appeal was presented admitted it and sent for the records. The appeal, however, came to be heard during the vacation by another Judge who, being of opinion that no appeal lay, declined to pass any final orders himself and left the case to be disposed of by the said Sessions Judge on his return. The Sessions Judge held that the judgment of the vacation Judge was final. On an argument being raised in the High Court that the Sessions Judge having once admitted the appeal, it was not open to the trying Judge afterwards to hold that no appeal lay, their Lordships held that even in the absence of any provision in the Criminal Procedure Code for admitting appeals, the mere fact of admission would not preclude the Court from dealing subsequently with the question of the competency of the appeal. [It will be noted that a similar rule

1912.

I. L. B. 40 Calc. 631.

Azis Sheikh
v.
Emperor.

Coxe and N. R.
Chatterjee JJ.

(1) (1912) 17 O. W. N. 52.

(2) (1912) 17 O. L. J. 392.

was laid down in a recent case for Civil Appeals. *Vismadev Das v. Sita Nath* (1), a short note of which appears in 17 C. L. J. 650.]

1911.

I. L. R. 36 Mad 216.

*In re Venkata
Reddy.*

*Arnold White, O J.,
Bankaran Nair and
Ayling JJ
(Full Bench.)*

Indian Penal Code, Sec. 499—Defamation—English doctrine of absolute privilege—If applicable in India.

This was a reference to the Full Bench made by Sundara Ayyar and Phillips JJ, the question referred being formulated in these terms:—

"Is the statement of a person charged with an offence in answer to a question by the Court trying him, 'what have you to say?' an absolutely privileged statement, so as to make him not liable to be punished for an offence under section 499, Indian Penal Code, in respect of the statement?" Upon the findings it was clear that the statement in question could not be brought under any of the exceptions to section 499, but there could be no question that under the English Common Law, if applicable, the statement would be *absolutely privileged* as made in the course of a judicial proceeding. The question, consequently, arose, whether the English doctrine could be extended in its application to this country, or the law of defamation for this country must be taken to be exhaustively laid down in section 499 of the Indian Penal Code, so that the only protection to witnesses and parties to a judicial proceeding is to be sought within the four corners of the Indian enactment. The English law is, it is to be noted very much wider than the Indian law, and is thus stated by Lopez J. in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* (2):—"The authorities established beyond all question this:—that neither party, witness, counsel, jury nor Judge can be put to answer civilly or criminally for words spoken in office; that no action for libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed."

The Full Bench held that though the English doctrine of absolute privilege is not expressly recognised in section 499, it does not necessarily follow that the Legislature intended to exclude its application from the law of defamation in India,

(1) (1911) I. L. R. 40 Cal. 259.

(2) (1892) 1 Q. B. 481 (at p. 451).

The provisions of the Indian law are mainly based on the English law of defamation, and it is only where the Legislature here intended to depart from the English law, that they made their intention clear by express enactment. It will be noted that the exceptions to section 499 correspond only to the classes of qualified privilege in English law, and there is no reference in the Indian Penal Code to the cases of absolute privilege, or even of qualified privilege in connection with judicial proceedings, recognised by the law of England. The legitimate inference to be drawn from this, according to the Full Bench, is that the Legislature in introducing the English Law into this country could not have intended to exclude that portion of it which relates to absolute privilege.

Their Lordships, further, pointed out the anomalous results which would follow, if the question of privilege had to be determined solely with reference to the provisions of section 499 of the Indian Penal Code.

As regards the authorities, the trend of decisions in the Madras and the Bombay High Courts is in favour of the doctrine of absolute privilege; that in the Allahabad and Calcutta High Courts against it. The following cases, amongst others, are referred to by their Lordships:—[Madras] *Murugesu Pillai v. Papathi Ammal* (1), *Nadu Gounden v. Nadu Gounden* (2), *Manjaya v. Sesha Shetti* (3), *Hayes v. Christian* (4), *In the matter of Alraja Naidu* (5), *Pachalperumal Chettiar v. Dasi Thangam* (6), *Pudmarasu Pantulu v. Venkatramana Aiyar* (7), *Adapala v. Rabala* (8); [Calcutta] *Golap Fan v. Bhola Nath* (9), *Queen v. Pirsoram Doss* (10), *Angada Ram v. Nemai Chand* (11); [Bombay] *Nathji Muleskvar v. Lalbhai Ravidat* (12), *Empress v. Babaji* (13), *In re Nagarji* (14); [Allahabad] *Abdul Hakim v. Tej Chandar* (15), *Dawan Singh v. Mahip Singh* (16), *Emperor v. Ganga Prasad* (17), and *Isri Prasad v. Umrao Singh* (18).

The Calcutta High Court was called upon in a recent case to decide the same point as was before the Madras Full Bench.

(1) (1897) 1 Weir's Or. Bulings 612.

(2) (1899) 1 Weir's Or. Bulings 589.

(3) (1888) I. L. B. 11 Mad. 477.

(4) (1892) I. L. B. 15 Mad. 414.

(5) (1907) I. L. B. 30 Mad. 222.

(6) (1908) I. L. B. 31 Mad. 400.

(7) (1909) 19 M. L. J. 217.

(8) (1910) M. W. N. 155.

(9) (1911) I. L. B. 38 Cal. 880.

(10) (1885) 3. W. B. (Or. B.) 45.

(11) (1896) I. L. B. 23 Cal. 867.

(12) (1890) I. L. B. 14 Bom. 97.

(13) (1893) I. L. B. 17 Bom. 127.

(14) (1895) I. L. B. 19 Bom. 310.

(15) (1881) I. L. B. 3 All. 815.

(16) (1888) I. L. B. 10 All. 425.

(17) (1907) I. L. B. 29 All. 635.

(18) (1900) I. L. B. 23 All. 234.

1912.

I. L. B. 40 Cal. 433.

Kari Singh
v.
Emperor.

Sharfuddin and
Cons JJ.

- There a defamatory statement was made by an accused, against whom a trial was pending in a Criminal Court, in a petition to the District Magistrate for a transfer of the case, and it was found that the statement was made in bad faith. The contention on behalf of the accused was that the statement was protected by the English Common Law doctrine of absolute privilege. Their Lordships held "both on principle and authority", that in Bengal there was no absolute privilege for a statement like that under consideration, when made in bad faith. The Madras Full Bench case above referred to, which was at the time reported only in a non-official report, was cited in argument, but the learned Judges expressed their inability to follow that decision.

1918.

I. L. R. 40 Calo 615.

Harihar Prasad

c.
Shyam Lal.*Harington and
Oarnduff, JJ.**Court-fee—Suit for declaration with consequential relief—Valuation.*

In a suit for a declaration that a decree amounting to Rs. 2,794-14 3 was forged, fraudulent, inoperative and unfit for execution, and also for a declaration that the family property valued at Rs. 7,000 was not liable to be sold in execution of that decree, (with an alternative prayer that if the whole of the property could not be released, the plaintiff's share might be released),—the plaintiff paid Court-fee ten times the Government revenue payable on the land worth Rs. 7,000,—basing his claim to do that on the provisions of section 7, sub-section V of the Court-Fees Act. It was held that that sub-section did not apply, as this was not a suit for possession of land, but a suit for a declaration with consequential relief, for which *ad valorem* fee was payable on the value of the relief claimed. The real value of the reliefs claimed here was held to be Rs. 2,794 and odd, the value of the decree sought to be declared inoperative, and not Rs. 7,000, the value of the whole property. Where it is shown on the face of the plaint that the value put on the relief by the plaintiff is too small, it is not only open to the Court but its duty to see that proper value is put. A plaintiff, again, cannot value his suit for the purpose of Court-fee and for that of jurisdiction at different amounts.

[See, in this connection, *Raj Krishna Dey v. Bepin Behary Dey* (1) where the question is fully discussed].

(1) (1912) I. L. R. 40 Calo. 245; 16 C. L. J. 124.

Sanction for prosecution—Second sanction—Criminal Procedure Code (Act V of 1908), section 195.

D brought a suit for money on a bond in the Calcutta Small Cause Court against L. The bond was found to be forged and the suit dismissed. Thereupon L applied for and obtained a sanction from that Court for the prosecution of D under section 471 Indian Penal Code; and proceedings were instituted by him in the Court of the Chief Presidency Magistrate. D moved the High Court to set aside the sanction, and obtained an interim stay of the criminal proceedings, but his application was ultimately rejected. While the case was pending in the Criminal Court, L applied to the Small Cause Court to pass a formal order of sanction in the manner prescribed by law, and the Court granted the application. Thereafter L applied to the Chief Presidency Magistrate to withdraw the case previously instituted by him and then pending against D, with liberty to apply for fresh process, whereupon the Magistrate passed the order:—"Summons withdrawn. Application dismissed." On the same date on which this order was passed, L applied for fresh process against D on the basis of the second order of sanction passed by the Small Cause Court.

Upon these facts, the question arose whether this second order of the Small Cause Court was passed with jurisdiction.

Their Lordships held that the order did not amount to a second sanction, that in fact there could be no second sanction; but that where there were two orders, as in this case, purporting to grant sanction to the same prosecution, the subsequent order must be taken to be nothing more than a repetition of the first and that the period of limitation would run from the date of the first order.

Construction of statute—Functions of the Court and of the Legislature distinguished.

Some very pregnant observations are made by their Lordships in this case as to the function of a Court in construing an enactment (or a written instrument). The particular enactment which called for interpretation here was section 4, sub-section 1 of the Trades Disputes Act, 1906 (6 Edw. 7, C. 47), which provided that "an action against a trade-union.....in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any Court." The plaintiffs, who commenced this action against the defendants, admittedly a trade-union, for damages for conspiracy to libel and for libel, contended

1913.

I. L. R. 40 Cal. 584.

Durga Prasad
v.
Lachman Banja.
Holmwood and
Chapman, JJs.

House of Lords (K)

1913.

[1913] A. C. 107.

Vacher & Sons, Ltd.
v.
London Society of
Compositors.
Viscount Haldane,
L. O.,
Lord Macnaghten,
Lord Atkinson,
Lord Shaw,
Lord Moulton.

that the immunity conferred by the above sub-section extended only to actions in respect of acts done in contemplation or furtherance of a trade dispute; while on the other hand, the defendants contended that the sub-section was quite general in its application, so that the present action, though only an ordinary action of tort, was incompetent against them. The Trades Disputes Act, 1906, was admittedly passed after the decision of the House of Lords in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (1), where it was held that a registered trade union might be sued in its registered name, as if it were a corporation, and also that a trade union, whether registered or not, could be sued in a representative action at common law, if the persons selected as defendants were persons who might fairly be taken to represent the union. This decision gave rise to keen controversy at the time, it being maintained on the one hand that it merely imposed on trade unions the legal liability which ought to accompany the immense powers with which they were vested, and on the other that it exposed these bodies to perils which must cripple their usefulness.

In interpreting the section of the Act in question in this case, their Lordships were met with suggestions as to the merits of these conflicting views and as to the reasonableness of presuming that the Legislature was acting with one or other of these views in its mind. Their Lordships, however, refused to be guided by any such considerations, as being beyond the legitimate scope of the function of a Court of justice in construing a statute. For it is "the universal rule," as Lord Wensleydale observed in *Grey v. Parson* (2) that in construing statutes and written instruments, "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further." This is indeed a fundamental canon of construction, which has been affirmed and re-affirmed in numerous cases and variously described as "a rule of common sense as strong as can be," as "a cardinal rule," "a golden rule;" or as "the most general of rules of great utility."

In once more emphasising the same rule in the present case—observed the Lord Chancellor:—"For my own part, I do not propose to speculate on what the motive of Parliament was. The topic is one on which Judges cannot profitably or properly

(1) (1910) A. C. 426.

(2) (1857) 6 M. L. C. 61 (106).

enter. Their province is the very different one of construing the language in which the Legislature has finally expressed its conclusions, and if they undertake the other province which belongs to those who in making the laws, have to endeavour to interpret the desire of the country, they are in danger of going astray in a labyrinth to the character of which they have no sufficient guide."

Again:—"I think that it would not only be beyond the functions of a Court of Justice to presume that the Legislature could not when it passed the Act have intended to go as far as the plain words used say, but that if Judges could speculate as to its intentions, they would probably speculate wrongly."

Equally emphatic was the language of Lord Macnaghten:—"Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgement. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature."

To the same effect was the observation of Lord Atkinson:—"But, as Lord Halsbury laid down in *Cooke v. Charles A. Vogeler Co.* (1), a Court of law has nothing to do with the reasonableness or unreasonableness of a provision of a statute, except so far as it may help it in interpreting what the Legislature has said."

No less expressive were the words of Lord Shaw:—"If, for instance, it be argued that the mind of Parliament "looking before and after," having in view the past history of a question and the future consequences of its language, must have meant something different from what it said, then it must be answered that all this essay in psychological dexterity may be interesting, may help to whittle language down or even to vaporize it, but is a most dangerous exercise for any interpreter like a Court of law, whose duty is loyally to accept and plainly to expound the simple words employed."

To the same effect were also the observations of Lord Moulton.

In the result, their Lordships held in favour of the defendants,

(1) [1910] A. C. 102 (at p. 107)

MUSSALMAN WAKF VALIDATING ACT, 1913.

Act VI of 1913.

An Act to declare the rights of Mussalmans to make settlements of property by way of "wakf" in favour of their families, children and descendants.

Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Mussalman Wakf Validating Act, 1913.

(2) It extends to the whole of British India.

Definitions.

2. In this Act unless there is anything repugnant in the subject or context,—

(1) "Wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable.

(2) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi-school of Mussalman law.

Power of Mussalmans to create certain wakfs.

3. It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes:—

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his life-time or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

Wakfs not to be invalid by reason of remoteness of benefit to poor, etc.

4. No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

Saving of local and sectarian custom.

5. Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect;

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LAWYER AND PHYSICIAN : A CONTRAST.*

Every lawyer when young should be apprenticed to some good physician, and should return to him regularly through life. Then we might hope that from the neighbouring profession of healing there might enter into him a spirit never to be wholly quenched by all the deadening influences of his work.

No fact could well be more surprising or offer a more delicate psychological problem than this, that, within two professions touching life upon matters of equal importance, professions of ancient dignity and learning, and inviting to their service men of equal and rare ability, there should in the same community be so different a spirit.

Medicine stands in this strange contrast to law, that while the public is clamoring for the lawyers to advance, the lawyers themselves as a class offer the chief resistance; the medical profession constantly outstrips and leads the public imagination in devices to check disease. Although much at the start was due to laymen, the campaign against tuberculosis, against infant mortality, against malarial and typhoid fevers, is largely captained and manned by doctors, who have the hearty support of the profession as a whole. The public does not have to drive and drag them from their satisfaction with methods which even to the laity are clearly antiquated and perverse. The doctors, unlike the lawyers, have rather to contend with public efforts to hold them back. Powerful lobbies and mass meetings have been known to oppose the doctors' most reasonable efforts to refuse the license to the vicious and untrained. And many a powerful newspaper, despite well-known medical ethics, publishes advertisements upon whose face are all the signs of a debasing and often criminal quackery. Yet the impulse of the profession, as a whole, is sufficiently strong to insure a remarkable progress in the face, not only of its own inner enemies, but of this indifference and opposition from without. Of two Rip Van Winkles awakening to-day, the physician would find his old methods as rust-eaten and useless as his instruments; the lawyer,

* Medico-Legal Journal Vol. XXX p. 181.

After a few hours with new statutes, would feel at home in any of our Courts.

In comparing the lawyers with the physicians one should not lose sight of the vices in medicine—its tendency to sects, its quackery, its blunders in diagnosis and in treatment, the readiness of some physicians to become accessory to forms of sexual evil, its disgracefully inadequate “colleges” in many parts of our country. Nor should we lose sight of the prevalent personal honor of lawyers—which is fully as great, in all likelihood, as that of physicians—and the inestimable service rendered the public, not only in the lawyers’ direct professional work, but also when, as individuals, they labor outside the strict lines of their profession. As legislators and high executive officials, federal and state, the lawyers almost alone govern us, and we prosper. To men of the type of Baldwin, Root, Hughes, and Taft, our society is in deepest debt. Yet the lawyers as a body, in the strict work of their profession—and it is of the pervading spirit only that I speak—face opposite to the men of medicine. As Judges, counsel, advocates, they are of the backward look. Their inertia here becomes almost our despair.

The parallel in medicine to the legal spirit lies in the distant past before that movement which, led by men like Harvey, Sydenham, and Locke, called modern medicine into life; at a time when the medical profession had finality of tone, looking back to Galen as to the completion of its work. In the ways of the lawyer one fancies one sees the Middle Ages present in the flesh. In Europe the past is most evident in the Church and the office of the Ruler. With us, these seem swept and garnished, while in our Courts is ancient dust and formalism. One finds here—not in some hole and corner of the profession, but in its high and open places—a willingness to look at words rather than at substance. It may be the exception, but it is no rare exception, here to have great issues hang upon a turn of phrasing, where the meaning admits no doubt. A, who has proved that B has defrauded him of money, is nevertheless refused redress because a Supreme Court is not sure but that “his money”, of which A complains that he has been defrauded, may mean the money of B. An action for murder comes to nought because the complaint fails to state that John Smith slain was a human being.

Such solemn examining of *p*’s to see whether one of them may not be written *q*; of every *i*, lest one may lack its

dot—all this seems to the layman little better than deciding affairs of state by the look of entrails or by the behavior within the sacred hencoop. The Court of Appeals of Newyork nullifying legislative acts directed to the relief of working-men—nullifying them because, it was held, they violated the constitutional guarantee regarding “due process of law”—reveals a power to think across empty spaces, which would have been hailed as modern and envied in those mediæval schools where stout realities were affirmed or denied because of thier supposed relation to distant ideas like “quiddities” and “intentions.”

Formalism thus run mad would be an anomaly in any part of our modern Occident. It is trebly strange in the most western of all peoples, in a nation careless of method, having an eye to results. Our medical profession would rush the cup of cold water to the sufferer by help of telephone and taxicab. Our legal profession would get it to him in the right way if it takes all summer. The difference in the temper of the two bodies is at once so strange and so important practically, that we must no longer delay our search for its source and origin.

There is a kinship, which few can have failed to notice, between the Lawyer and the Priest. While the priest has at times been physician—as with the Egyptian, the Hindu, and the mediæval European, as well as with the savage—yet the connection is more intimate and stubborn between jurist and ecclesiastic. Civil and conon law, closely joined at one time in Europe, have often been quite confused, as in ancient Palestine. At the dinner where Jesus denounced the Pharisees because they tithed mint and cummin and forgot judgment and the love of God, a lawyer present declared, amazed, that this attack on the Pharisees touched his, the great legal profession. Jesus accepted his challenge, in stinging words that some of the laity to-day would like to see carved on buildings where lawyers congregate: “Woe unto you lawyers also ! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers.” And then he described legal and ecclesiastical conservatism so that none need think it peculiar to any land or age. The lawyers, Jesus said, were always ready to stone the prophet, stone him who proclaimed the dawn of a new day ; but when ancient dust had claimed the man, the profession would erect to him a costly monument ; the lawyers had no intercourse with living truth, they kept from men the key of knowledge.

The lawyer knows that statutes change, that the law is something which legislatures can amend; yet the body of the law stands there immovable, in part—where, as with us, the Common Law prevails—a mere mass of precedent which he is to accept, expound, and apply. The professional mind in the presence of such a task works not unlike that of the priest who would apply and expound and defend against misconstruction a body of revealed truth. And especially is the mind in the two professions tempted to a like observance of all minutiae of procedure. As the ritualist resents innovation in his ceremonial, resents the estimate of his rites by mere reason and utility, so the lawyer shows toward his legal rites an attachment which brings wonder and solemnity to laymen. Habituated to these rites as he is, they have become to him inseparable from the end for which they exist. He ministers in the Temple of Justice, and ancient piety long deadened into custom keeps him from seeing that to his divinity the new moons and offerings are an abomination until there comes into them again some regard to the widow and the fatherless.

For all the difference in their work, the jurist and the ecclesiastic are thus schooled in like modes of thought. When Huxley went forth in the name of Darwin to smite the embattled bishops, the fray was not so different, however it may have differed in magnitude and in genius of leadership, from that which now, as at all times, society must wage against its lawyers. There is in both cases an effort to modernize, to force living thought into the body; an effort met by immense inertia, not to speak of active resistance.

The conservatism of the lawyer comes thus in part from the contagion of the law. For the law represents the stability, the habit, of our social life, as against creative, reformatory energy. So we must not deny the value of his trait. His is the virtue—and the vice—that lies in habit. Here, as with each of us personally, habit is indispensable, even though it call forth no enthusiasm. Though it does not drive us forward, and too often binds, yet we should not advance without it, for the gain once made would slip away.

A further cause for the lawyers' temper is found in those influences almost inseparable from every *establishment*.

We have no established religion; we have no established school of medicine. We have, however, an established Law Court, with its vast body of ministrants. In a country until

recently jealous of governmental action, and where all possible things were left to private initiative, we have wisely refrained from intrusting to personal enterprise the organization and support of courts. Thus we have in the case of law an establishment; and, further, an establishment without rival.

The Church of England, the Lutheran Church in Prussia, must brook competitors. The organization maintained by government is constantly measured and spurred on by the work and spirit of dissenters. The nonconformist, eager and critical, is a gadfly that will not let the stately body sleep. Even the school system, which is the only other establishment in the United States—unless we were to include manufacture, which, under our tariff laws, is, too, in a measure established—the public school sees its own handiwork and economy set by the side of private enterprise. The public high schools must compare their outcome with that of the great private academies; the universities of California, Wisconsin, Michigan must justify themselves before rivals like Harvard, Chicago, Stanford. But Law lacks all such spur of rivalry. We cannot choose whether we shall bring our complaint before a government court or before some college of judges erected by a Carnegie or a Rockefeller, with its corps of assistants to obtain evidence and support the verdict. We thus lack opportunity to demonstrate how much better the work might be done. The establishment, consequently, subjected only to wordy criticism, drones on its ancient way. It suffers the fate of any organism that is never called to energetic struggle. This, in addition to all the pride and deadening satisfaction which is the inner foe of every establishment.

Yet we must also look to some cause which we do not share with others. For our American legal profession, in its attachment to form at the cost of substance, outdoes the British, being more conservative, less pliable. Our criminal trials are notoriously more cumbrous. And while, as Judge Baldwin tells us, the prosecution of a criminal is more certain to occur with us than with the English, because undertaken at the public expense, yet this gleam cheers faintly since we know how far less often we convict; and even when there is conviction, how prevalent is the abuse of appeal. The selection of our juries is viewed with wonder from across the water. The English judge is a more active director of the trial, checking the advocate, brushing aside obstructions, driving at the

- truth. We began to reform our procedure earlier than did the English; but the effort soon spent its force.

This heightened archaism of our legal system arises in a large measure from early dread. Fearing the official oppressor, we have doggedly maintained and even strengthened all that ancient mechanism of law which seemed to promise a defence of the individual against governmental power. Thus we have fortified the court in order to check the other powers of government. But we have put our hand upon the judge by having him, in most of our States, chosen by popular vote. And when elected he often listens, as one bereft of wit and power, to the devices of the other officials, the advocates, of his court; he acts in constant fear of the error into which the court's own official's are trying to entrap him; his decisions are subject to almost endless review by other courts. And the jury, as a further check, and as representative of the plain and unofficial people, has been elevated and its selection refined to technical infinity.

Thus the popular dread of the strong official arm—until, of late years, we have come to know the full strength of the private and corporate arm—is responsible for some of the very anachronisms of which we complain. The inbred conservatism of the lawyer has with us been reinforced by the doubts and cautions of our people themselves.

To these inducements toward conservatism should be added still another. Almost all our lawyers pass through the school of *advocacy*. And advocacy in its present form is as though planned to take from the jurist whatever rounded view he may have had of his larger social duty, his responsibility to the man who is not his client. In theory the attorney is an officer of the court: His first duty is to the court and to society. In practice he is, in most cases, hired by an individual to serve that individual's need. Too often he thus becomes in effect a mercenary, ready to fight on either side, careless of all larger issues. He becomes habituated to shifting from himself the higher forms of obligation. Better that he win an unjust victory, many a lawyer has told me, than that he should not maintain to the utmost the side he has espoused. Not he, but the system and those who frame the system and the laws, are accountable for the outcome. His work is that of a wheel in a mechanism; to win cases when he can, and to leave to others so to check his effort that he shall not win unless the weight of law be with him.

Great men like Lincoln, and many men less great, cannot

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so view their work; they cannot feel themselves released from their responsibility. But the rank and file of the profession lose themselves in the ancient sophism. They repeat to themselves the high theory of advocacy and of its power for justice—a theory based utterly on fiction, and incapable of working justly unless the opposing advocates were always of equal talent. The plain lawyer, shutting his mind to the larger consequences of his acts, loses vision, and the profession becomes mechanical, dehumanized. The man of law who says, "My concern is not with justice, it is with the winning of cases," has more temptation and excuse; but his position is otherwise not unlike that of a physician who should say, "My duty ends with the man who pays the fee. If a neighbor would not suffer from the infectious substance which I remove, let him and his own hired doctor look to that."

Advocacy sharpens intellect at the expense of character. It is almost the worst of schools. It trains to ingenuity and concealment. Hourly the man is engaged in a work whose success depends to some extent upon a warped judgment; upon seeing both sides in some degree, but in confining his convictions, if possible, to the one side. If he can bring himself to believe in the partial, the strength of his appeal then has the strength of ten. Advocacy calls from the buried depths of the mind the unsympathetic, the contentious, powers—for which the public interest has some place, but a place daily lessening. There is thus a certain inducement to relax the social bond, to view the particular rather than the general good. And consequently devotion to the common interest, which is so important for advance, here meets a serious check. Paid advocacy thus joins with those other inducements which I have named to account for the lawyers' and the law's delay.

The readier response, the leadership, which the medical profession shows, is not merely apparent and due to the lagging of the lawyers. There are special conditions favorable to free movement.

And first of these is the dependence of medicine upon natural science, from whose advance some motion must inevitably be caught. The knowledge of the bodily life and of its disturbances has been steadily increasing since the revival of learning. Discoveries like that of Harvey have been encouraged, and supplemented by instrumental invention. The microscope, the stethoscope, the clinical thermometer, the centrifuge, the

• radiograph, have each given an added impetus to medical studies, and have helped to bind medicine closer to science by making the judgment of the physician surer and more exact ; while the various products of germ-culture, coming as they have with many chemical discoveries, have put into the hands of the physician means like those which surgery has found in its great discoveries of anæsthesia and of the methods of antiseptis and asepsis. The men of medicine have thus come to look daily for some new light ; there has grown in them a habit of expectancy and of putting to instant use the fresh offerings of science and of technical invention. They have, during the later centuries, and especially during the later decades, been so frequently given the effective means of advance, that advance has become the second nature of the profession. The alliance of medicine with natural science is thus close and inevitable. And to the scientific progress of the age we must attribute much of the alertness that is so signally present among the doctors.

A second cause of the physicians' spirit of progress, in contrast with the conservatism of the Bar, is that the immediate end and object of medicine is not in conflict with other great social ends. The doctor does not need to heal one man at the cost of health to another. The lawyer, in extending the boundary of one man's right, too often must contract another's. His is a work of adjusting claims in conflict. Whatever he does affects the interests of other men and is scrutinized and resisted by them. The individual lawyer is not free to put into operation some entirely new principle whose value he may perceive ; he is not free to experiment effectively, as is the scientist and the physician. The counselor must fit his judgment into the usages of his society. The advocate is met and checked by the opposing advocate and by the judge. And the judge's judgment, in turn, must be approved by other judges. Not until he sits upon the supreme bench may the judge be freely inventive and independent, and even then he has his fellow judges ; and he has reached this eminence only after a schooling and a drill that should forever quiet all love of the fresh and creative.

The doctor, too, works within a system ; he, too, must consult and is held in check at many points by public and professional habits of thought. But he is, after all, infinitely freer to prescribe and to operate, infinitely freer to attempt some promising uncertainty, to accept and apply some daring scientific assurance. His work is relatively personal, and admits of his flashing forth

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that spark of creative genius which is in each human being. The lawyer's work is social and collective and methodically organized, and cannot be remodeled by every eager mind. The very eagerness of the mind is thus damped and discouraged, and finally forever killed.

The work of the medical profession thus offers a graver responsibility because offering more freedom to the individual practitioner; while with the lawyer individual responsibility—although present in many ways, in that a betrayal or a mistaken judgment may bring ruin to others—is limited by the very limits of his freedom; he must merely apply principles in whose making or discovery he can, as he keeps to his immediate work, have but the slightest part.

Medicine, traditionally less honorable than law, and less closely knit into social and governmental institutions, thus is far freer of limb.

If my account is right, the responsibility for this inconvenient contrast rests with the laity as well as with the profession. Each side must be brought to see wherein it can help to make the work more responsive to refreshed ideas. Yet the leadership in such a movement must come from the profession itself. For the lawyers alone can fully understand their system, purge it, amputate if need be. The laity can only hold up to them a glass, tell them how sick and sluggish their system is, how much they need the physician. In this way the laity can at least aim to disturb their complacency, to make them constantly aware of the great distance between their accomplishment and what society maintains them for and rightly expects. The legal profession knows, yet it needs daily to be told, that it is not here for its own sake nor merely for the law. As the physician is to keep his eye fixed upon health and not upon some mere system of medicine, so the lawyer, looking beyond law, must recognize in himself a minister of justice, to live and grow with the growth of that great ideal.

The principle of justice is not like a Platonic idea, eternally changeless; it is a living energy in the mind, expressing itself in changing form, as does the idea of beauty. The lawyer, too attentive to mere law—a chalky deposit of this living force—catches the fixity, the definiteness, and loses sight of the vitality of justice. He should know its formal utterance in the past; but he should be ready day by day to bring it to a more perfect expression.

Sir Thomas More, while giving physicians high honor in his Utopia, would admit no lawyers. We need not go so far. A kindly and penetrating autocrat in our country would merely abolish their graver abuses. He would watch the doctors at their work, notice in their ways something more urbane, more spiritualized than is found among the men of law. To his imagination the law court and the hospital would reveal a common purpose—to care for disorder, to hear and answer complaint. But how different is the manner of the surgeons with their attendant nurses intent upon their operation, from that of the lawyers and their clerk at their tasks of removing from the human system some festering wrong! The expense of time, the burdening preliminaries, the gathering dust and smoke, the variety of finesse, perhaps even of outrageous imputation or open insult—one wonders how a great profession can tolerate such methods for a day. They smack of varnished pugilism rather than of an intelligent desire to apply to human misery the spiritual, indeed divine, idea of justice. There in the surgery, the white-gowned doctors and the nurses, dealing with a problem distinctly physical, seem to represent and symbolize the refinement, the intelligence, the silent mastery, the perfect co-operation, which lies at the heart of all that is truly civilized.

Our autocrat, noticing this, would compel his lawyers secretly to watch the group; and those in whom, after long watching, no spirit of emulation was awakened he would take from the law and set to other tasks.

BY G. M. STRATTON.

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THE ANNALS OF THE BENGAL BAR.

Of all the British Indian Institutions in Bengal, the Bar is the most important. History of the origin and growth of this institution is intimately connected with the general History of Bengal. Its economic, social and political influence in this country is immense. It has created a new "middle class" of people, has made them prominent and the present day leaders of the people are mostly lawyers. A free Bar, said Lord Halsbury in welcoming Maitre Labori, was the bulwark of liberty of subjects. In this country also the Bar, in all constitutional questions and questions affecting administration of justice, has always championed the cause of popular rights.

From the day when the fiat went forth that "the pleadings of causes should be made a distinct profession; and that no persons should be admitted to plead in the Courts but men of character and education versed in the Mahomedan or Hindu Law and in the Regulations passed by the British Government" (1) down to the present time, history of Bengal Bar is history of unimpeded progress. The Bar in this country consists of 3 main branches. (A) The Advocates; (B) the Solicitors and (C) the Vakeels and Pleaders. Of these three, the first two were introduced into this country on the day when Sir Elijah Impey and his companions justices (Chambers, Lemaistre and Hyde JJ.) took their seat as Judges of the Calcutta Supreme Court, and history of these two branches is, to a great extent, the history of the profession in England. These two branches are exotic, but the third is purely indigenous. For its origin and development we must turn to old Regulations. This branch of the profession, like the "zemindari system" in Bengal is entirely the creation of the British Indian system of administration of justice. In this paper we shall trace and examine the history of the origin and development of the three different branches of the profession; but as the third branch is purely indigenous, has spread its shadow all over the country, and has been adorned by such legal luminaries as Prasanna Kumar Tagore, Ramaprasad Roy, Shambhunath Pandit, Dwarkanath Mitter, Sir R. C. Mitter,

(1) Regulation VII of 1793. Preamble,

Sir C. M. Ghose, Sir Gooroodas Banerjee, Sir Asutosh Mookerjee, Dr. Rash Behari Ghose, who by their labour enriched the legal literature of Bengal and influenced the making and moulding of the laws of the country, we shall take up the third branch in the first place, then we shall examine the annals of the other two branches. The members of any profession, in any part of the world may be proud of such precious heritage. Tradition of Bengal Bar is sure to exercise wholesome influence on the present and future generations of lawyers in Bengal.

Vakils & pleaders.
Reg. VII of 1793.

When the East India Company took up the actual administration of justice in this country in 1772, the parties to suits had the option of pleading their causes in person, or appointing such *vakeels* or agents for that purpose. But this rule did not work satisfactorily. The generality of these *vakeels* have been either private servants or dependants of the parties deputed to plead the particular cause in which their employers were engaged; or men who followed the business of *vakeels* to obtain a livelihood, and appeared in the Courts of justice, or wherever the concerns of their constituents required their attendance. The *vakeels* of the first description were for the most part necessarily unacquainted with the constitution and forms of the Courts. They were consequently exposed to the intrigues of the ministerial officers, who not only harassed and extorted money from them, by an abuse of authority in the execution of the common process of the Courts, but often impressed them with an idea that it was in their power to influence the decision of the Judges, and converted the deception to their private advantage (2). These *vakils* being unaccustomed to judicial proceedings, protracted the trials by producing unnecessary exhibits, stating irrelevant questions to the witnesses, and summoning persons to give evidence, whose testimony was unessential to the development of the merits of the case. The very slight knowledge which they in general possessed of the Mahomedan or Hindu Law, and their still more limited acquaintance with the regulations passed by the British Government, (upon which the security of the persons and property of the inhabitants of these provinces chiefly depends) rendered them incapable of urging the best arguments in support of the claims of their constituents, or of judging whether the decisions and proceedings of the Courts were conformable to the laws and regulations, or other-

(2) Traditions die hard and this evil practice, it is sometimes stated, is still in existence in some parts of the country.

wise. The *vakeels* of the second description, although better acquainted with the practice of the Courts than the first, were equally unfit for their situations. They assumed and relinquished the occupation, without apprising the Courts in which they acted. When they appeared in the capacity of *vakeels*, no enquiries were made to ascertain whether they were qualified for the employment; nor were there any rules prescribed as a security to their constituents for the diligent and faithful performance of their trust. Equally with the first description of *vakeels*, they were little versed in the laws and regulations of the country, and not having the protection of a public character, and their situation in the Court not being defined by any regulations of Government, they were subject in the same degree to the intrigues and assumed influence of the ministerial officers of the Courts, and unable to protect their employers from oppression and exaction. On the other hand, the allowances of these *vakeels* not being fixed by any public regulations, and as they were generally entertained upon a fixed salary, their demands were frequently exorbitant, and when engaged, it became their interest to protract, instead of expedite the decision of the suit, as their salary ceased with the termination of it. . . .

To establish security of property, and protect individuals in the enjoyment of the privileges and immunities which have been granted to them, many regulations must necessarily be enacted. The great body of the people, although they will feel the benefit of their operation, must necessarily be precluded by their pursuits and occupations in life from attending the Courts of justice, or acquiring a sufficient knowledge of the laws and regulations, to qualify them for pleading their own causes. It is therefore indispensably necessary for enabling the Courts duly to administer, and the suitors to obtain justice, that the pleadings of causes should be made a distinct profession; and that no persons should be admitted to plead in the Courts but men of character and education versed in the Mahomedan or Hindu Law, and in the regulations passed by the British Government; and that they should be subjected to rules and restrictions calculated to secure to their clients a diligent and faithful discharge of their trusts. . . . That the pleaders may not be deterred from pleading the causes of their clients with becoming freedom, and that men of education and respectable character may be solicitors to be admitted as pleaders in the Courts, their appointments ought to be secured to them as long as they

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conform to the Regulations under which they act; and they should not be removable until they have been proved guilty of a breach of those Regulations to the satisfaction of the Sadar Dewany Adalut." Thus runs the preamble of the Regulation for the appointment of *vakeels* or native pleaders, in the Courts of civil judicature in the Provinces of Bengal, Behar and Orissa (Reg. VII of 1793, repealed by Reg. XXVI of 1814, § 2). It consisted of 33 sections.

Who could be selected pleaders.

The pleaders were to be selected from amongst the students in the Mahomedan College at Calcutta (Madrassa) and the Hindu College at Benares. If those Colleges did not furnish sufficient number of pleaders, the Sadar Dewany Adalut could admit any other persons provided they were Mahomedans or Hindus and men of good character and liberal education (§ 5). *Sunnuds*, under the seal of the Sadar Dewany Adawlut and attested by the Registrar of the Court were given to the pleaders. (§ 3).

Sunnuds.

Oaths.

Oaths had to be taken by pleaders upon their admission. They had to swear that they would truly and faithfully execute their duties as pleaders to the best of their knowledge and judgment. The Mahomedan pleaders had to make the oath every six months. (§ 4).

Retainer 4 annas.

"Upon a pleader agreeing to undertake the prosecution or defence of a suit, the party entertaining him is to present him with *four annas* as a retainer."

Scale of fees.

Section 9 of this Regulation (VII of 1793) fixed the scale of fees (3). Under section 14 pleaders were allowed a fee of four annas for filing petition, or making a motion.

The *vakeels* attached to one Court were not allowed to plead in any other Court, without the sanction of the Sadar Dewany Adalut. (§ 21).

Suspension & dismissal of pleader.

Pleaders convicted of promoting and encouraging litigious suits, or of frauds, or of gross misbehaviour, although not relating to any cause in which they were engaged, were suspended; and the Court reported the grounds of suspension within a month to the Sadar Dewany Adalut, which could fine the defaulting pleader or dismiss him as it thought fit. But no pleader could be dismissed from his office but for incapacity or misconduct in the

(8, On sums not exceeding	One	thousand	and	six	rupees	...	5	per cent,
	Five	"	"	"	"	...	4	"
	Ten	"	"	"	"	...	3	"
	Twenty-five	"	"	"	"	...	2	"
	Fifty	"	"	"	"	...	1	"
	One lakh	"	"	"	"	...	1	"
On sums above ...	A lakh	"	"	"	"	...	1	"

discharge of his public duty, or gross profligacy or misbehaviour in his private conduct proved to the satisfaction of the Sadar Dewany Adalut. (§§ 17, 22).

Pleaders who were unable to attend the Court from indisposition had to inform the Registrar of the Court of his absence. If any case was called on when the pleader engaged in it was absent not because of indisposition or he did not inform the Registrar of his illness, the for then first "*offence*" he was fined Rs. 50, for the second Rs. 100 and he was "dismissed from his office" if he absented himself without leave, for the third time. (§ 32)

Pleaders had to get leave of absence.

Fine for absence.

In those days printed law books were very rare, Bar-libraries did not exist and the pleaders and the public in general had great difficulty in getting Law Books. To obviate this difficulty to a certain extent section 6 of the Regulation laid down:—

A copy of all Regulations with the translations, to lie for public inspection in the Courts.

✕ "There shall be kept for public inspection in the several Courts of Judicature in Bengal, Behar and Orissa, printed copies of all such Regulations, with translates in the Persian and Bengal languages, bound up with an index. . . . *The regulations are to be deposited upon a table*, to be expressly allotted for that purpose in some part of the Court-room, and to lie for public inspection every day, Sunday excepted, from the hour of nine in the morning until three in the afternoon; and during that time, the pleaders of the Courts, and all other persons, are to be at liberty to refer to the regulations, or take copies or extracts from them in the Court-room."

To find out how this Regulation was working Lord Wellesley asked for the opinion of the Judges and Magistrates of Burdwan, Midnapur and Murshidabad and those officers unanimously testified to the fact that the pleaders were generally well acquainted with the laws of the country and discharged their duty with "fidelity and honor" (4).

It is clear from what has been stated above that none but Hindus or Mahomedans were admitted as vakeels. This rule continued till 1846 when Act I of 1846, § 4 altered it and enacted "that the office of Pleader in the Courts of the East India Company shall be open to all persons of whatever nation or religion, provided that no person shall be admitted as a pleader in any of those Courts unless he had obtained a certificate in such manner as shall be directed by the Sadar Courts, that *he is of good character* and duly qualified for the office, any law or

Only Hindus and Mahomedans were eligible for enrollment as vakeels.

Change in the rule.

Act I of 1846.

(4) See Mr. Acharyya's Tagore Lectures for 1912, Codification in British India, Lec. II.

regulation to the contrary notwithstanding." Regulation VII of 1793 had been amended and ultimately repealed and now we shall deal with those enactments.

Reg. XXIII of 1814.

Reg. XXVII of 1814.

Who could be appointed *vakils* of the Munsiff's Court.

Who could appoint such *vakils*.

Fees.

Reg. XXVII of 1814.

Sadar Dewany and Provincial Courts *vakils*.

Dismissal of *vakils*.

§ 6 Reg. XXVII of 1814.

In the year 1814 when the rules regarding the office of *Munsiffs* and *Sadar Amins* (Head Commissioners) were consolidated by Regulation XXIII of 1814 that enactment provided that no persons should be allowed to plead or act as a *vakeel* in the Court of any Munsiff, unless he was a relative, servant or dependant of the person for whom he might be appointed to act; or unless he should have received a *sunnud* of appointment from the *zillah* or city Judge. (§ 15, Reg. XXIII of 1814).

The Judges of the city and *zillah* Courts were authorized to appoint a sufficient number of *persons of good character* and duly qualified persons to act as *vakeels*. These *vakeels* on getting *sunnuds* from the Judges of the city and *zillah* Courts, had to make oath that they would faithfully discharge their duty as *vakeels*. They could be deprived of their *sunnuds* when they were guilty of *misconduct*, or of *incapacity*, or of *gross profligacy* or misbehavior. There was another reason for cancellation of *sunnuds* but that is not in existence now, *vis.*, when the Judge of *zillah* Court considered it inexpedient to continue the number of *vakeels* appointed, he could recall and cancel the *sunnuds* granted to the *vakeels* of his Court. These *vakeels* could settle their fees with their clients and the settled fee was mentioned in the *vakalutnamah*. This Regulation was passed on the 29th November 1814. On the same day another Regulation (Reg. XXVII of 1814) was passed to consolidate the Regulations and Rules regarding the office of *vakeels* in the Courts of Civil Judicature. Under the provisions of this Regulation the Sadar Dewany Adalat and the Provincial Courts were empowered to appoint the *vakeels* of their respective Courts. The *vakils* of the *zillah* and city Courts were appointed by the *zillah* Courts subject to the sanction of the Provincial Courts. (§ 3, Reg. XXVII of 1814).

Pleaders employed by the several Courts of Judicature could be dismissed from office if guilty "of encouraging or promoting litigious suits; of wilfully delaying the suits of their clients for their own advantage; of refusing, without sufficient cause, to carry on the suits of their clients, after having accepted a *vakalutnamah*; of demanding or accepting from their clients any fee, or sum of money, goods, effects, or other valuable consideration beyond the fees, . . . or of other misconduct in the discharge of their professional duty; or of gross profligacy or misbehaviour in their private conduct.

B. K. ACHARYYA.

(To be continued.)

REVIEWS.

The Indian Decisions, New Series, CALCUTTA, VOLS. 3 & 4; ALLAHABAD, VOLS. 7 & 8, MADRAS 1 & 2. LAW PRINTING HOUSE, MADRAS, 1913. We are gratified to find that this great undertaking is making steady and satisfactory progress. Of the Calcutta Series *four* volumes, namely, Vols. 6, 7, 8 & 9 are reproduced in the *two* volumes before us. Of the Allahabad Series *six* volumes are reproduced, *viz.* Vols. 13 to 18. Of the Madras Series *seven* volumes are reproduced, *viz.* Vols. 1 to 7. The get-up of the volumes is as usual excellent, whilst the brief annotations are particularly useful.

The All India Digest, CIVIL (1811—1911). By T. V. SANJIVA ROW, VOL. VII, LAW PRINTING HOUSE, MADRAS, 1913.—This exhaustive digest continues to make steady progress and the end is well in sight. The *seventh* volume now before us covers the headings from Mortgage to Pre-emption. Both these subjects are of great practical importance; but we have others of almost equal importance, such as, Negotiable instruments, Partnership and Possession. There is also a very elaborate heading on Practice and Procedure, which will repay careful perusal. It is superfluous to refer to the special excellence of this work to which a reference was made in our notice of previous volumes.

All India Civil Court Manual. By T. V. SANJIVA ROW, 2ND EDITION, VOL. 2, LAW PRINTING HOUSE, MADRAS, 1913.—The All India Civil Court Manual by the late Mr. Sanjiva Row has attained such wide spread and well deserved popularity amongst the members of all branches of the profession that a detailed statement of its merits is unnecessary. The second edition is on the same lines as the original issue published two years earlier, with this important difference that the annotations of judicial decisions and the historical summaries have been carefully revised and brought up to date. We have no doubt that this improved edition will continue to enjoy the same support from the profession as the original issue.

All India Century Civil Digest (1811—1912). By B. R. DESAI, VOLS. 9 & 10. BARODA, 1913.—Mr. Desai is an indefatigable worker and his great digest is very near completion. The volumes now before us contain all the headings from

Pleading to Symbolical possession. Many of the topics covered by these volumes are of considerable practical importance; we need mention only one as an example. The heading Superintendence of High Court brings together a large number of judicial decisions,—many of them little known to the profession—in which the nature and extent of the revisional jurisdiction of the High Court have been examined. The importance of the collection of all the cases on a point like this can hardly be over-estimated. We understand that another volume will be sufficient to complete the Digest.

The Indian Companies Act. By P. L. BUCKLAND, B.A., THACKER, SPINK & CO., CALCUTTA, 1913. Price Rs. 10.—The consolidation of the Statutory Law relating to Companies in this country obviously necessitated a fresh commentary on the subject. Mr. Buckland has given the profession the requisite assistance. As he points out the field is a well-trodden one, as the Indian commentator must necessarily avail himself of the labours of eminent specialists like Lord Justice Buckley and Sir Francis Palmer. Mr. Buckland however has spent a great deal of independent labour upon the work in re-arranging the cases and in collecting references to all the Indian decisions on the subject. So far as we have been able to test the work the statements are concise and accurate and we have no doubt the commentary will be of great use to the profession.

Hindu Law. By C. S. RAMAKRISHNA, B.A., B.L., VOL. II, HINDU LAW OFFICE, MYLAPORE, MADRAS.—We desire to accord a very cordial welcome to the second volume of this notable work on Hindu Law. The topics included in this the concluding volume are Alienation, Partition, Inheritance, Succession, Gifts, Wills, Impartible estates, Woman's estate. Minority and Guardianship, Endowments, Stridhan and Custom. The chief merit of the work consists in the lucidity of the statement of the leading principles of each topic. This is followed by a detailed examination of the judicial decisions which are classified under convenient sub-head. In many places the statements of the substances of the case are sufficiently full to render a reference to the original report superfluous for ordinary purposes. Throughout the work will be found interposed helpful criticisms. The work is possibly too full for the beginner, but will be found admirable by the advanced students as also by the practitioner,

Handbook of Hindu Law. By P. C. LAHIRI, B.L., DĀS GUPTA & CO., CALCUTTA, 1913.—The author describes this work as a short treatise, but it may more appropriately be described as a Guide book for students. If it is properly used, it may be helpful to examinees, but there is great reason to apprehend that it may be misused by students who may rely upon it and ignore the standard treatises on the subject as also the leading cases which they are required to read. With regard to the latter the author is under a misapprehension as to their use. He states that the students are to read separately a book containing the analysis of Leading Cases and that to remove this inconvenience he had fully and accurately analysed all the leading cases prescribed by the University. We do hope that no student will read the analysis thus presented to him; what the student is expected to do is to study the classical judgments and to analyse them himself, so as to be able to extract the underlying principles. The learned author has taken considerable trouble in preparing the work, but we are unable to say that he has, in any way, advanced the cause of legal education.

Leading Cases on International Law. By NORMAN BENTWICH, SWEET & MAXWELL, LONDON 1913, Price 12s. 6d.—This is a book of great value to students starting on the study of International Law, who will find a really helpful companion to any leading text book he may use. The judgments are given in the language of the Judges, though here and there they are abridged by the omission of portions not material for the illustration of the chief point in controversy. The book is not overloaded with commentary and leaves room for the intelligent students to think and form his own opinion. The author very rightly observes that the student should become acquainted as early as possible with the way in which questions of International Law are dealt with by the Courts. This result cannot be achieved by a study however diligent of a digest or summary of the cases. The judgments themselves must be studied and analysed so as to let the students appreciate the methods by which the results are reached. The work is bound to take a prominent place amongst the leading books on International Law.

Leading Cases in Equity. By W. H. H. KELKE, M.A., THIRD EDITION, SWEET AND MAXWELL, LONDON, 1913. Price 6s.—

This new edition of Mr. Kelke's *Epitome of Leading Cases in Equity* shows considerable improvement throughout. Many new cases have been added to the older ones, while in some places, more modern decisions have been brought in to supersede earlier decisions. This indeed was necessitated by the publication of the new edition of the great work of White and Tudor on which this epitome is professedly based. The work is of considerable value and is wisely used, but notwithstanding its well-deserved popularity we have always felt that it might be improved greatly if the explanations were made fuller; in many places it reads almost like a crib and it is unfortunate that throughout the book we find numerous abbreviations which could easily have been avoided (for example, Ety, St, JA, Plff, Dft, CL and numerous others of the same type). These abbreviations tend to create the erroneous impression that the work is a mere cram book.

The Coronation Durbar. By SIR COURTENAY ILBERT, CLARENDON PRESS, OXFORD, 1913. Price 2s. 6d. net.—This is a second supplement to the classical work on the Government of India by Sir Courtenay Ilbert. It concisely states the consequences of the announcements made at the Coronation Durbar by His Majesty the King Emperor and brings together in a handy and convenient form the despatches and other official documents on the subject.

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No. 12.

NOTES ON CASES.

Non-transferable holding—Whether an usufructuary mortgage works a forfeiture.

The question in this second appeal was whether the mere fact that the tenants defendants mortgaged their holding by way of usufructuary mortgage and put the mortgagee in possession, the holding not being transferable by custom, entitled the landlords plaintiffs to re-enter. The current of authorities shows that the unauthorized transfer of a holding or the parting with the possession of it, in whole or in part, does not *per se* work a forfeiture under the Bengal Tenancy Act. To have that effect, there must be something in the nature of an abandonment by the tenant. See, for instance, *Kabil Sardar v. Chandra Nath* (1) and *Mathura v. Ganga* (2). The case of *Baroda v. Hemlata* (3) is not really inconsistent with the earlier decisions. There is no reason why the above principle should not apply to the case of a transfer by way of usufructuary mortgage in the same way as to other partial transfers.

Shebait, not a person competent to alienate—Land Acquisition Act (I of 1894), Sec. 31, cl. (2).

* This case follows the decision in *Kamini Bibi v. Promotho Nath* (4), and lays down that a *shebait* of an idol is not a person "competent to alienate the land" within the meaning of section 31, clause (2) of the Land Acquisition Act, 1894. It is settled law now (observed Ray J.) that the position of the *shebait* is analogous to that of a manager of an infant. He is entitled to possess and manage the dedicated property, but has no power to alienate it in the general character of his rights.

Indian Evidence Act (I of 1872), Sec. 122—Admissibility of communications during marriage.

The question in this case was as to the admissibility of certain statements ascribed to a person, since deceased, by his

(1) (1892) I. L. B. 20 Calc. 590.

(8) (1908) 18 O. W. N. 590.

(2) (1906) I. L. B. 38 Calc. 1219.

(4) (1911) 18 O. L. J. 597.

1918.

I. L. B. 40 Calc. 870.

Bhupendra Nath
Bose.

*
Bansi Tanti.

Richardson and
Newbold JJ.

1913]

I. L. B. 40 Calc. 895

Rampersanna

*
Secretary of State.

Ouse and Ray JJ.

and—

1918.

I. L. B. 40 Calc. 891.

Nawab Howlader

*
Emperor.

Jenkins (J. J. and
Sharfuddin J.

widow, who deposed to the same as having been made to her. The prosecution sought to prove the statements under section 32(3) of the Indian Evidence Act, but the defence objected that they were inadmissible under section 122. The Court held that the statement to which the widow deposed was a communication made to her during marriage by a person to whom she had been married. Not only, therefore, could she not be compelled to disclose that communication, but she should not have been permitted to disclose it, for there was no one who did or could consent to the disclosure. The prohibition enacted by section 112 rests on no technicality that can be waived at will, but is founded on a principle of high import which no Court is entitled to relax.

Ring game—Ostensible means of livelihood—Criminal Procedure Code, Section 109.

1918.
I. L. R. 40 Calo. 702.

Bangali Shah
v.
Emperor.

Coco and N. B.
Chatterjee J.J.

The conduct of what is known as the "ring game" is held to be an ostensible means of subsistence within the meaning of section 109 of the Criminal Procedure Code. Compare *Hari Singh v. King-Emperor* (1), where it was held that the conducting of that game was not an offence under the Gambling Act.

[This last case was distinguished in a recent decision of the Allahabad High Court, *Emperor v. Ahmad Khan* (2), which was a case under Act III of 1869, section 12 of which is somewhat different in language from section 10 of the Bengal Public Gambling Act.]

Criminal Procedure Code, Section 223—Joinder of distinct offences in one charge—An illegality.

1918.
I. L. R. 40 Calo. 846.

Angar Ali
v.
Emperor.

Harrington and
Coco J.J.

The accused in this case was charged with dishonest misappropriation in respect of a total sum of 10 annas 6 pies, to wit, a sum of 4 annas 6 pies collected from a certain person between certain dates in one year, and a sum of 6 annas collected from another person between other dates in the same year. The question was whether the joinder of the two offences under one charge was an illegality which was fatal to the proceedings. Their Lordships held it was, and set aside the conviction. There were two distinct offences, and for each offence a separate charge ought to have been made, under section 223 of the Criminal Procedure Code.

(1) (1907) 6 O. L. J. 708.

(2) (1911) I. L. R. 84 All. 96.

Attachment—Warrant—Nazir's power of delegation.

A warrant for the attachment of cattle, which was addressed on the face of it to the bailiff, was endorsed by the Nazir with a direction to a particular peon to execute it within a particular day, which was however a few days earlier than the day fixed by the Court issuing the warrant for its execution. The peon in question made the attachment after the expiry of the time fixed by the Nazir, but before the date fixed by the Court. The question arose, in these circumstances, if the execution was a lawful execution. It was held that there was no question of delegation of authority by the Nazir in this case, as in *Dharam Chand Lall v. Queen-Empress* (1). The peon who made the execution derived his authority from the Court that issued the warrant, and not from the Nazir who endorsed it. That authority was not lessened by the circumstance that the officer having general superintendence over the persons who executed warrants, *vis.* the Nazir, directed the peon to do his duty within a particular time. In the result it was held that the peon had legal power to act under the warrant at the time it was executed.

1913.
L. L. R. 40 Calo. 849.

Subed Ali

v.
Emperor.

Harington and
Coe JJ.

Provincial Insolvency Act (III of 1907)—Can a Receiver be appointed of "pilgrim business"?

The question in this case was whether a Receiver could be appointed under the Provincial Insolvency Act, 1907, in respect of the "pilgrim business" of a *panda* or hereditary priest attached to the temple of Jagannath at Puri, who had been adjudicated an insolvent under that Act. The business consisted in receiving pilgrims, housing them, feeding them, looking after their comforts, and in accompanying them to the temple, for which services the priest received from the pilgrims a fee in the nature of a voluntary payment. It was held that what the priest did for the pilgrims could not be appropriately described as "business" within the meaning of clause (c) of section 20. Nor could the exercise of his calling by the insolvent be deemed a "trade" within the meaning of sub-section (1) of section 40, so as to justify an order under that section appointing the insolvent himself to carry on his trade for the benefit of the creditors. It was further pointed out that under section 20, clause (c), the receiver could ordinarily carry on the business of the insolvent so far as might be necessary for the beneficial winding up of the same, but not with a view to profit, as was the object of the creditor in this case. The application for the appointment of a Receiver was accordingly rejected.

1913.
L. L. R. 40 Calo. 878

Anand Mahanti

v.
Ganesh Maheswar.

Mecherjee and
Beachcroft JJ.

1918.

I. L. R. 40 Calo. 836.

Promod Chunder De

v.
Corporation of
Calcutta.

Fletcher J.

Calcutta Corporation—Refusal by Chairman and General Committee to sanction building plan—Whether an action for mandamus is maintainable.

It is held in this case that a suit does not lie by a person whose plans for building have been refused sanction by the Chairman, and on appeal, by the General Committee of the Corporation of Calcutta, for a declaration that the plans comply with the terms of the Calcutta Municipal Act (Bengal III of 1899) and should therefore be approved. The only remedy of the plaintiff, if the plans have been rejected *mala fide*, is an application under section 45 of the Specific Relief Act for an order to compel the Chairman and the General Committee to hear the matter in the manner provided by the law. So long as the Chairman and the General Committee have acted honestly and not in excess of their authority, their decision is not capable of being reviewed by any Court. Under section 375 of the Act the Chairman is made a sort of Court of first instance, and the General Committee a sort of Court of Appeal, and these are the only local tribunals who have the power to decide whether plans for intended buildings comply with the Act or not. See the cases of *Davis v. Bromley Corporation* (1) and *Smith v. Chorley Rural Council* (2), which are conclusive on the point.

1918.

I. L. R. 40 Calo. 862.

Bidyaprasad Narain
Singhv.
Ashraf Singh.Sherfuddin and
Richardson JJ.

Power of Civil Court to appoint new Receiver—When Receiver in possession under section 145 (2) of the Criminal Procedure Code.

The question in this case was whether the Civil Court acting under Order XL of the Code of Civil Procedure has power to appoint a Receiver in supersession of the Receiver appointed by the Magistrate under clause (2) of section 146 of the Criminal Procedure Code. On the authority of *Barkat-un-nessa v. Abdul Aziz* (3), it was contended that the existence of the order passed by the Magistrate was no bar to the exercise by the civil Court of its power to appoint a Receiver, and reliance was also placed on *Lokenath Shah v. Nedu Biswas* (4), in support of that view. The first case, however, turned on the language of section 145 and not section 146, and in the second, though the High Court there refused to interfere with the management by the Magistrate of the property attached under section 146, the point now before the Court did not arise. Their Lordships point out in the present case that where Receiver is appointed in respect of

(1) (1908) 1 K. B. 170.

(8) (1900) I. L. R. 23 All. 214.

(2) (1897) 1 Q. B. 678.

(4) (1902) I. L. R. 29 Calo. 882.

property attached by the Magistrate under section 146 of the Criminal Procedure Code, his possession is the possession of the Magistrate, and the Magistrate holds possession or custody under a statutory power or title which is good against the parties until a judicial determination by a competent civil Court of the "rights of the parties" or "the person entitled to possession." An interlocutory order by a civil Court appointing a receiver does not amount to such a determination. Clause (2) of Rule 1 of Order XL of the Code of Civil Procedure makes it quite clear that nothing in that rule shall authorize the civil Court to remove from possession or custody any person whom any party to the suit has not a present right so to remove. The mere institution of a suit in the civil Court does not give the parties a right to interfere with the Magistrate's possession, and consequently it neither gives the Court any right to possession *contra mundum*.

It is suggested, accordingly, that where in such circumstances the civil Court is asked to appoint a receiver, it should make a conditional order, that is, an order to take effect on the Magistrate withdrawing his attachment. As to the selection of a receiver, unless there is good reason to the contrary, the civil Court should as a matter of judicial discretion, though not as a matter of law, appoint the same man as had been appointed by the Magistrate.

